



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 81/100

INSTRUCTIONS

1. This assessment paper will be made available at **13:00 (1 pm) SAST on Thursday 23 November 2023** and must be returned / submitted by **13:00 (1 pm) SAST on Friday 24 November 2023**. Please note that assessments returned late will not be accepted.
2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Avenir Next font (if the Avenir Next font is not available on your PC, please select the Arial font). This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. Please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case). Candidates who include very long answers in the hope it will cover the answer the examiners are looking for, will be appropriately penalised.
4. You must save this document using the following format: **studentID.Paper1Summative**. An example would be something along the following lines: 202223-336.Paper1Summative. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. The assessment can be downloaded from your student portal on the INSOL International website. The assessment must likewise be returned via your student portal as per the instructions in the Course Handbook for this course. **If for any reason candidates are unable to access their student portal, the answer script must be returned by e-mail to david.burdette@insol.org.**
6. Due to the high incidence of load shedding currently taking place across South Africa, candidates are required to determine whether any load shedding is scheduled during the examination period and, if so, to make alternative arrangements to write elsewhere if at all possible.
7. Enquiries during the time that the assessment is written must be directed to David Burdette at **david.burdette@insol.org** or by WhatsApp on +44 7545 773890 or Brenda Bennett at **brenda.bennett@insol.org** or by WhatsApp on +27 66 2282 010. Please note that enquiries will only be responded to during UK office hours (which are 9 am to 5 pm GMT, or 11 am to 7 pm SAST).

8. While the assessments are open-book assessments, it is important to note that candidates **may not receive any assistance from any person** during the 24 hours that the assessment is written. **Answers must be written in the candidate's own words; answers that are copied and pasted from the text of the course notes (or any other source) will be treated as plagiarism and persons who make themselves guilty of this will forfeit the assessment and disciplinary charges will follow.** When submitting their answers, candidates will be asked to confirm that the work is their own, that they have worked independently and that all external sources used have been properly cited. If you submit your assessment by e-mail, a statement to this effect should be included in the e-mail.
9. Once a candidate's assessment has been uploaded to their student portal (in line with the instructions in the Course Handbook), a confirmatory e-mail will be auto-generated confirming that the assessment has been uploaded. If the confirmatory e-mail is not received within five minutes after uploading the assessment, candidates are requested to first check their junk / spam folders before e-mailing the Course Leader to inform him that the auto-generated e-mail was not received.
10. If a candidate is unable to complete this summative assessment (examination), please note that a re-sit assessment will only be given if there are exceptional circumstances that prevent the candidate from completing or submitting it (such as illness). Feedback on the final assessment will be provided within four weeks of the paper having been written - please do not enquire about your marks before four weeks have elapsed.
11. You are required to answer this paper by typing the answers directly into the spaces provided (indicated by text that states [Type your answer here]). For multiple-choice questions, please highlight your answer in yellow, as per the instructions included under the first question.
12. Unless otherwise indicated, all references to sections are references to sections of the Insolvency Act 1936.

PART 1 - MULTIPLE CHOICE QUESTIONS (20 MARKS)

ANSWER ALL THE QUESTIONS

QUESTION 1

Questions 1.1 – 1.20 are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question. Each of the 20 questions count 1 mark.

Question 1.1

Select the **correct** statement:

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

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

Question 1.2

Select the **correct** statement:

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

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

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

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

Question 1.3

Select the **correct** statement:

The granting of a winding-up order:

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

(b) Has no effect on pending civil proceedings.

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

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

Question 1.4

Select the **correct** statement:

Property acquired by an insolvent after sequestration of his estate:

(a) Generally forms part of the insolvent estate.

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

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

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

Question 1.5

Indicate the **incorrect** statement:

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

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

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

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

Question 1.6

Select the **correct** statement:

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

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

Question 1.7

Select the **correct** statement:

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

Question 1.8

Select the **correct** statement:

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

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

Question 1.9

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

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

- (a) True
- (b) False ✓

Question 1.10

Select the **correct** statement:

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

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

Question 1.11

Select the **correct** statement:

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

- (a) The company itself.
- (b) One or more of its creditors (including contingent or prospective creditors).

(c) A shareholder.

(d) Jointly by any or all the parties in (a), (b) or (c). ✓

Question 1.12

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

(a) The primary purpose of a special meeting is to allow creditors to vote on important matters related to the insolvent estate. The trustee must convene a special meeting when requested by the insolvent, regardless of expenses.

(b) Special meetings are convened for creditors to prove their claims, and the trustee must convene one if requested by an interested person who tenders payment of all expenses related to the meeting. ✓

(c) The main objective of a special meeting is to finalise the distribution of assets to creditors and must be convened by the trustee after the second meeting.

(d) A special meeting cannot be convened for the purpose of interrogating an insolvent as the primary purpose of a special meeting is to prove claims.

Question 1.13

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

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

(a) True

(b) False

Question 1.14

Select the **correct** statement:

Which of the following statement is correct in relation to a compromise between a company and its creditors in terms of section 155 of the Companies Act 71 of 2008?

(a) A proposal for a compromise in terms of section 155 is adopted by the creditors of the company, or a class of creditors, if it is supported by a majority in number representing at least 75% in value of the creditors or class present and voting in person or by proxy.

(b) Section 155 does not apply where a company is under business rescue proceedings.

(c) A liquidator where a company is being wound up may propose an arrangement or a compromise of the company's financial obligations.

(d) Paragraphs (a) and (c) are correct.

(e) Paragraphs (a), (b), (c) and (d) are correct.

Question 1.15

Select the **correct** statement:

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

(a) The bondholder, as a secured creditor, can always insist on selling the property free from a lease, regardless of when the lease was entered into.

(b) If the lease was entered into after the registration of a mortgage bond, the bondholder may insist on selling the property free from the lease, provided the sale subject to the lease did not realise enough to pay the bondholder's secured claim.

√

(c) The property must always be sold subject to the lease, regardless of when the lease was entered into.

(d) If the property is sold without reference to a lease concluded after the registration of a mortgage bond, the sale is valid even if it did not realise enough to pay the mortgage bond in full.

Question 1.16

Select the **correct** statement:

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

(a) Whether the provision is capable of being applied in a winding-up.

(b) Whether the matter is specifically provided for by the Companies Act.

(c) Whether the provision applies to the type of winding-up.

(d) Only paragraphs (a) and (c) are correct.

(e) Paragraphs (a), (b) and (c) are correct. √

Question 1.17

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

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

Question 1.18

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

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

- (a) True ✓
- (b) False

Question 1.19

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

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

Question 1.20

Select the **correct** statement:

Which of the following statements describes the position of employees during business rescue proceedings?

- (a) During a company's business rescue proceedings, employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that changes occur in the ordinary course of attrition, or the employees and the company agree on different terms and conditions of employment, in accordance with applicable labour laws. ✓
- (b) During a company's business rescue proceedings, the business rescue practitioner can unilaterally vary the employment terms and conditions of the employees of the company immediately before the beginning of those proceedings, subject to the approval of the company's creditors at the first meeting of creditors.
- (c) During a company's business rescue proceedings, all employment contracts that existed immediately before the beginning of those proceedings are automatically suspended.
- (d) All of the above

14/20

**** 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)

Once a sequestration order or winding up order is granted it freezes or crystalizes the insolvent estate's position and the hand of the law is laid upon the estate, usually by the master and then by the appointment of the trustee or provisional liquidator. This is when all the rights of the creditors of the estate must be taken into consideration and all actions or steps during insolvency process must be taken in the best interest of the general body of creditors. No transaction is allowed regarding the estate matters by a single creditor to prejudice the general body of creditors, to prefer one creditor above another is not allowed, this is the whole purpose of the *concursum creditorum*.

The purpose is to secure the assets of the estate, realizing the assets to the benefit of the estate in terms of the preference of creditors

As per *Walker v Syfert and Ward v Barrett NO* 4

Question 2.1

Write a short paragraph and explain what possible remedy is available to Ms Abel to deal with the antique clock which Mr Solar delivered to Mr Hasty in full and final settlement of his claim. In your answer refer to the relevant section of the Insolvency Act that will apply and what requirements must be met. (7)

In terms of section 29 of the Insolvency Act, this is seen as voidable preference. In terms of section 29, states every disposition of the insolvent's property made not more than six months before the sequestration of a debtor's estate, which has had the effect of preferring one creditor above another, may be set aside by court, if such disposition, the insolvent's liabilities exceed its assets value, unless the creditor in whose favour the disposition was

made proves in was made in the ordinary course of business and was not to prefer one creditor above another.

Thus can Ms Abel institute legal proceedings against Mr Hasty for the recovery of the clock of the value there off. Thus a valuation needs to be done and to see if the value was in the normal course of business and not preferring one creditor above another, that the value did not exceed the amount owed to the creditor.

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)

When a applicant creditor launches an application he must on prima facie √prove the following requirements:

- That the applicant qualify as a creditor and only such may bring such a application, √that the applicant creditor has a liquidated claim of at least R100.00 against the respondent (insolvent) if there is two or more creditors to bring an application, they can apply jointly, only if their claims is R100.00 or more to court; √
- That the debtor is factually insolvent∕ or has committed an act of insolvency, √if a demand made and he states he is unable to pay its debts, or a judgement is granted against the debtor and a nulla bona is received, not enough asset to cover his liabilities; √
- Stating the reason why the sequestration would be to the advantage of creditors is place in provisional sequestration; √

One must always state is to the benefit of creditors that a estate must be placed in provisional sequestration. 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)

The right of inheritance accrues before the insolvent is rehabilitated it falls into the insolvent estate and vest immediately in the trustee of the estate. In terms of Vorster v Steyn, stated that the inheritance of received or due to the insolvent vest in the insolvents estate, was nudum praeceptum.

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)**

In terms of section 23(7) of the Insolvency act, the insolvent may for their own benefit recover any pension to which they may be entitled to for services rendered, thus falls outside of the insolvent estate and creditors have no claim to it. In terms of section 3 of the General Pension Act, pension received under any pension lay by any person whose estate is sequestered does not form part of the insolvent estate. **2**

Question 2.5

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

The sale agreement that was concluded between the insolvent Mr Solar and Mr Green is referred to a credit sale agreement, for movable property, the transaction is not seen as an instalment sale agreement in terms of the NCA, thus section 84 of the Insolvency does not apply. The sale agreement concluded is seen as a non credit sale in terms of the Common Law. The ownership went from the seller to the purchaser on delivery of the vehicle and thus falls into the insolvent estate. Mr Green has a concurrent claim for the outstanding amount of the vehicle against the estate. **4**

Question 2.6

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

The first meeting of creditors is convened by the master after receiving the final order of sequestration or liquidation, a notice must appear in the government gazette not less than 10 days before the first meeting of creditors. **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 needs to do a section 18(3) read with section 80bis √ requesting the Master for extension of powers to sell the assest with prior written consent√ from secured creditors if any. The master may before the second meeting of creditors√ authorise the sale of property on such conditions and such manner set out by the master. The sale will must always adhere to the notice and directions set out by the master. √

Ms Abel must in writing provide reasons why the assets must be sold and motivation therof.

If the master refuses, Ms abel can approached the court in terms of section 18(3) this sale will still be subjected to the notices and conditions set out by the master. √ **4**

Question 2.8

Question 2.8.1

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

Answer:

If the insolvent was domiciled in South Africa and sequestered in a South African court, the trustee must recovery all assets within or outside of South Africa. √ Yes Ms Abel will be able to exercise control over the immovable property, she needs to apply for a letter of request √and depends on the Law of Insolvency in Italy, she first needs to apply in Italy to be recognized as a trustee. Once she complied she has control over the immovable property√ **3**

Question 2.8.2

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

NO, the same procedure would be applicable. **Common law position = movable property**

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)

Section 13 of the Insolvency Act deals with deals with partnerships, when the estate of a partner is sequestrated it does not necessarily follow the partnerships estate or the estates of the reaming partners, to be automatically be sequestrated. ✓

When a order is granted , the effect of the sequestration of one of the partners estate is that the partnership's estate it self will terminate and as such the partnerships estate would be wound up.

When a order is granted in terms of section 13 of the Act, when a partnership is sequestrated, all the partners personal estate would also be simultaneously be sequestrated. ✓ 2

Question 2.9.2

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

When a order is granted , the effect of the sequestration of one of the partners estate is that the partnership's estate it self will terminate and as such the partnerships estate would be wound up. 1

28/40

** END OF QUESTION 2 **

QUESTION 3 FOLLOWS ON NEXT PAGE / ...

PART 3 - LIQUIDATION (40 MARKS)

QUESTION 3

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

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

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

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

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

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

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

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

QUESTION 3.1

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

Commercial insolvency is when a company is unable to pay its debts, even when asset exceeds its liabilities. A company has R100 million worth of asset, but does not have cash on hand to settle a debt when it is due or made.

Factual Insolvency is when a company's liabilities exceeds its debts, not enough asset of cash on hand to settle any demand that is due or made. A company has R 100 million worth of creditors but assets to the value of R15 million and R 6 million cash, if all the creditors make a demand the company could not settle the demand as not sufficient assets of cash on hand to settle the debt. **5**

QUESTION 3.2

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

The estate vest master of the high court when order is granted until appointment of provisional liquidators is made then the provisional liquidator. **1**

QUESTION 3.3

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

All contracts are suspended when the provisional order is granted, the employees have unliquidated concurrent claim against the estate for damages for the breach of contract. During the suspension of employment the employees are not required to work or render any service to the estate and will not be entitled to remuneration or employment benefits

in terms of the suspension, they are however entitled to unemployment benefits in terms of the Unemployment Insurance Act. ✓ **3**

QUESTION 3.4

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

The lease agreement will terminate after three months if the liquidators do not elect to renew or carry on with the lease until all moveable assets are removed and sold. ✓ The rental for the three months will form part of the section 89 costs in the administration of the estate. ✓

In terms of section 84, the landlord's hypothec confers any right as a preferential claim against the insolvent estate. ✓ Only arrears up to the date of the liquidation order are all arrears before the date of liquidation is a secured claim. ✓ This is also limited with section 85. ✓ **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)**

In terms of section 359(1) of the Companies Act, the liquidation order suspends all civil proceedings until a liquidator is appointed. The liquidator can then elect or not to elect to proceed with the civil proceedings, however the party instituting the proceedings of which is not the insolvent estate needs to notify the liquidator of his intention to proceed with these proceedings or not. ✓ **2**

QUESTION 3.6

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

In terms of section 402, Mr Hue, must state the following in his report to creditors:

The liquidator must state all the reasons the company is unable to pay its debts, the reasons and acts of insolvency committed by the company, reason for the failure, and set out the

causes of the failure, in terms of RNH he must state due to the fact the effect of loadshedding unable to meet the demand from clients and the financial distress regarding cash flow issues of cancellation of contracts. ✓

Mr Hue must indicate if the liquidators will submit a report in terms of section 400 (2) to the master in terms of any negligence and failure of fiduciary duties or any criminal financial irregularities regarding the financial management of the companies affairs. ✓

All progress and prospects of the winding up of RNH, and the way forward regarding the sale of assets collections thereof and any outstanding matters. ✓

If RHN kept any financial records and if so that they have been inspected, if not that these must be report in terms of section 400, what was the financial position on date of liquidations. ✓

If any further inquiries must be held regarding the trade dealing and affairs of the insolvent estate. ✓

The amount of capital issued by RHN, the estimate of all assets and liabilities. ✓

The liquidator bring matters to the attention of the creditors of he may request directions from the creditors and directions in that regard. ✓

Any other matter he may deem fit to report on to creditors if any. ✓ 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)

There is different claims for the employees and will discussed as follows:

The employees have the right to submit claims for 3 month unpaid salaries, ✓ these claims is preferent claims in terms of section 98A ✓ of the Insolvency Act. This claim is also statutory preferent claim in terms of section 98A of the Insolvency Act, up to maximum of R12000.00. ✓

The balance of the unpaid salaries of the employees will be claimed as concurrent claims. ✓

All unpaid leave of the workers will be concurrent claims up to a maximum of R 4000.00. ✓

The employees in terms of section 38 read with section 98A, the employees will be entitled to severance benefits should the contract of employments be terminated, and they will be

further entitled to a unliquidated concurrent claim for damages due to the termination of employment. ✓ **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; ✓
- It must cover corporeal moveable property; ✓
- The property must be specified and describe in a way that it is readily recognisable; ✓ **3**

QUESTION 3.9

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

In terms of the hierarchy is SARS a preferent creditor and has an lien over the raw material, in this instance. In terms of section 99 (cA) states that any amount of any customs, exercise or sales duty or interest, fine or penealty which in terms of the Customs and Exchange Act, **section ?** was immediately prior to the sequestration of the estate due by the insolvent. ✓

Thys is SARS a preferent creditors in terms of statutory obligations and must be paid, ✓ as soon as the are paid the raw material would be release or a agreement could be made if the material is sold, that they would be paid in terms of their lien over the material,. ✓ **3**

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)**

For a business rescue to succeed, the board of directors, must prove that reasonable grounds exist that the company is financially distressed and have reasonable grounds/prospect that the company could be saved. Chapter 6 sates that the directors needs to consider all circumstances of the company at time of the meeting regarding the financial position of the company and would any creditors support the rescue. There is further two elements subjective and objective, subjective element of the director personally involved and the objective director element.

All fact must be taken into consideration when dilleberating on the aspect of placing the company in business rescue. The resolution that directors want to adopt to place the company in business rescue proceedings cannot proceed if liquidation proceedings have been initiated, in this instance the application was served on a employee of the company thus date of liquidation when the application was served by the sheriff. The purpose of this is to prevent directors of distressed companies fromadopting resolutions to place companies in business rescue to prevent the liquidations proceedings issued against a company bona fide.

When directors want to adopt a resolution in terms of business rescue, as stated Kovacs Investments v Investec Bank, A reasond and factual basis must exist that the company could be saved.

In Pan African Shopfitters v Edcon & Others, the court discussed the "initiation" of liquidation proceedings, in terms of section 129(2) provides that a resolution that the directors want to initiate business rescue proceedings, may not be adopted if liquidations proceeds have been instituted, and if a resolution been adopted has no forec until filed.

In Mouton v Park 200 development, referd to initiation of liquidations proceedings in terms of section 129 (1), was that the application for liquidations issuing not constitute initiation of liquidation proceedings, but the service of the application by the sheriff constituted iniation of liquidation proceedings, this was confirmed in Tjeka Training Matters v KPPM Constructions.

Thus the directors of RNH would not succeed with a business rescues just on the basis that loadshedding would not end soon, the amount of debt, no immovable property thus the company is factual and commercially insolvent. **5**

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

39/40
TOTAL MARKS: [100]