



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 76/100

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)

[The sequestration of a debtor's estate establishes a *concursum creditorum* - which is also known as the "coming together of creditors". In the case of *Walker v Syfret 1911 AD 141*, the court indicated that the concept was to ensure a due distribution of assets between the creditors in the order of their preference and as such requiring that the rights of the creditors as a group be preferred to the rights of individual creditors.]

The effect of this is that individual creditors could not by execution obtain the full payment of their claim at the expense of other creditors nor could they attach any assets acquired by the debtor after sequestration. Upon confirmation of the sequestration order, no other transactions could be entered into with regards to estate matters by an individual creditor, if allowed, this would prejudice the general body of creditors.]

This allows the creditors to deal with their claims as it existed at the issuance and confirmation of the sequestration order, with no added and prejudicial advantage which would result if individual creditors were allowed to seize and dispose of the estate assets individually.] 4

Question 2.1

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

[Mr Solar, as a result of his dire financial situation and inability to pay Mr Hasty, disposed of an asset in favour of a creditor (Mr Hasty) thus preferring such creditor above other

creditors. As a result of this disposition (which means the transfer or abandonment of rights to property), the creditor (Mr Hasty) received full payment of the debt prior to Mr Solars sequestration. This had the prejudicial effect of elevating Mr Hasty who could be a otherwise unsecured creditor to the ranks of a secured creditor.

It is evident from the facts provided that the antique clock is of great value. So as to retrieve the antique clock, Ms Abel may rely on Section 29 (1) of the Insolvency Act 24 of 1936 which deals with voidable preferences and reads as follows:

“(1)Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, if he is deceased and his estate is insolvent, before his death, which has had the effect of preferring one of his creditors above another, may be set aside by the Court if immediately after the making of such disposition the liabilities of the debtor exceeded the value of his assets, unless the person in whose favour the disposition was made proves that the disposition was made in the ordinary course of business and that it was not intended thereby to prefer one creditor above another.”

Section 29 (1) of the Insolvency Act 24 of 1936, further entrenches the principle of concursus creditorum as the section ensure that a distribution will take place according to the legal order of pefrence in the sequestration process.

Thus so as to successfully claim the antique clock back from Mr Hasty, Ms Abel needs to prove the following:

- i. That the disposition was made by the insolvent within six (6) months prior to the sequestration. It is evident from the facts that Mr Solar had infact made the disposition of the antique clock himself by delivering it to Mr Hasty to settle his debt in full a month before his provisional sequestration.
- ii. That the effect of the disposition was to prefer one creditor above the other. Mr Solar in delivering the antique clock to Mr Hasty had the effect of preferring Mr Hasty above the other creditors in that Mr Hasty’s debt was paid in full.
- iii. Immediately after making such disposition Mr Solars liabilities exceeded his assets.(the value of Mr Solars estate on the date of disposition) This was confirmed in the case of *Dobrin v Trustees Estate Dobrin 1932 WLD 195*. Ms Abel will be able to prove upon a preponderance of probabilities that Mr Solar was factually insolvent in that his sequestration occurred a month later on the 15th of January 2023. This burden of proof was confirmed in the case of *Nicholls and Whitelaw v Akoo 1948 (4) SA 197 (N)*. This can further be proven by objectively estimating Mr Solars liabilities against the proven claims of the estate and comparing it with a reasonable assessment of Mr Solars assets. Mr Hasty will not be able to prove that the disposition was made in the ordinary course of business as it was clearly made to settle Mr Solars debt.

Ms Abel will be able to retrieve the valuable antique clock by virtue of Section 29 (1) of the Insolvency Act 24 of 1936, upon application to a relevant and competent court in this instance.]

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 24 of 1936 states as follows:

"If the Court to which the petition for the sequestration of the estate of a debtor has been presented is of the opinion that prima facie -v

(a) the petitioning creditor has established against the debtor a claim such as is mentioned in sub-section (1) of section nine; and

(b) the debtor has committed an act of insolvency √or is insolvent; √and

(c) there is reason to believe that it will be to the advantage of creditors of the debtor if his estate is sequestrated, √

it may make an order sequestrating the estate of the debtor provisionally."

For the court to grant a order in terms of Section 10 the requirements of Section 9 of the Insolvency Act , in the first instance must be complied with.

Section 9 (1) which reads as follows:

"A creditor (or his agent) who has a liquidated claim for not less than fifty pounds, or two or more creditors (or their agent) who in the aggregate have liquidated claims for not less than one hundred pounds against a debtor who has committed an act of insolvency or is insolvent, may petition the Court for the sequestration of the estate of the debtor." -

Axit Finance, by way of application in its founding affidavit allege and provide prima facie proof that Axit Finance, is the creditor of a certain amount of money not less than 50 pounds, that the claim is liquid and the cause and nature of the claim is in this instance is of monies lent to Mr Solar (personal loan). Axit Finance in their founding affidavit which is to be deposed to by a natural person duly authorised and competent to bring the application on behalf of Axit Finance and depose to the affidavit, should state whether the claim is secured or not and if Axit Fiance is holding security for the personal loan. Should security be held, the nature and value of that security is to be disclosed as well.

Section 10 (b) further states that Mr Solar should have committed an act of insolvency of which the various acts have been provided for in Section 8 of the Insolvency Act which states the following:

"A debtor commits an act of insolvency -

- (a) *if he leaves the Republic or being out of the Republic remains absent therefrom, or departs from his dwelling or otherwise absents himself, with intent by so doing to evade or delay the payment of his debts;*
- (b) *if a Court has given judgment against him and he fails, upon the demand of the officer whose duty it is to execute that judgment, to satisfy it or to indicate to that officer disposable property sufficient to satisfy it, or if it appears from the return made by that officer that he has not found sufficient disposable property to satisfy the judgment;*
- (c) *if he makes or attempts to make any disposition of any of his property which has or would have the effect of prejudicing his creditors or of preferring one creditor above another;*
- (d) *if he removes or attempts to remove any of his property with intent to prejudice his creditors or to prefer one creditor above another;*
- (e) *if he makes or offers to make any arrangement with any of his creditors for releasing him wholly or partially from his debts;*
- (f) *if, after having published a notice of surrender of his estate which has not lapsed or been withdrawn in terms of section six or seven, he fails to comply with the requirements of sub-section (3) of section four or lodges, in terms of that sub-section, a statement which is incorrect or incomplete in any material respect or fails to apply for the acceptance of the surrender of his estate on the date mentioned in the aforesaid notice as the date on which such application is to be made;*
- (g) *if he gives notice in writing to any one of his creditors that he is unable to pay any of his debts;*
- (h) *if, being a trader, he gives notice in the Gazette in terms of sub-section (1) of section thirty-four, and is thereafter unable to pay all his debts."*

Assuming that Axit Finance was aware that Mr Solar had disposed of his asset (being the antique clock to Mr Hasty to settle his debt), Axit Finance may allege this in their founding affidavit so as to comply with Section 10 of the Insolvency Act 24 of 1936.

Axit Finance will then have to allege, in terms of Section 10 (c) that it would be to the advantage of the creditors of Mr Solar that his estate be sequestered. Axit Finance in this instance is only required to prove to the court that there is a reasonable prospect that the sequestration would be to the advantage of creditors which is in the instance of compulsory sequestrations.]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)

[Section 20 (2) (a) and (b) applies in this instance and states the following:

"For the purposes of sub-section (1) the estate of an insolvent shall include -

(a) all property of the insolvent at the date of the sequestration, including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment;

(b) all property which the insolvent may acquire or which may accrue to him during the sequestration, except as otherwise provided in section twenty-three.” √

Mr Solar inherited before he could be rehabilitated, and as the general rule is that any property acquired during sequestration belongs to the estate. The inheritance of Mr Solar will immediately vest in Ms Abel as trustee of Mr Solar's estate. Mr Solar in accepting the inheritance allowed for the inheritance to be included in his insolvent estate. √ In the case of *Wessels NO V De Jager NNO 2000 (4) √ SA 924 (SCA)* the court ruled that an heir obtains competence as opposed to a right, to accept the inheritance. As such the trustee will only have a vested right to the inheritance, √ once the heir accepts it (which Mr Solar did). Had Mr Solar opted to reject the inheritance such repudiation would not amount to a disposition in terms of the Insolvency Act 24 of 1936.] **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)**

[Mrs Solar assuming that she was married in community of property with Mr Solar would be co-debtor of the creditors in the insolvent estate. This contention was further addressed in the case of *Badenhorst v Bekker NO 1994 (2) SA 155 N*, it was stated that the sequestration of parties married in community of property results in the insolvency of both spouses.

However, Section 23 (7) of the Insolvency Act 24 of 1936 states that an insolvent may for their own benefit recover any pension of which they are entitled to for services rendered. In addition, Section 3 of the General Pensions Act of 1979 states that benefits received under the any pension law by a person whose estate has been sequestrated will not form part of the assets of the insolvent estate. This was confirmed in the case of *Foit v Firstrand Bank Bpk 2002 (5) SA 148 (T)*.

Section 37 (b) of the Pension Funds Act of 1965 further asserts that the pension shall not form part of the insolvent estate. As such Mrs Solar's pension will not fall 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)**

[Assuming that the vehicle was registered in the name of Mrs Solar and that Mr Solar had donated the vehicle to Mrs Solar which resulted to the vehicle being registered in the name

of Mrs Solar the provisions of Section 21 of the Insolvency Act 24 of 1936 would apply with states the following:

“(1) *The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section.*

(2)

The trustee shall release any property of the solvent spouse which is proved -

- (a) to have been the property of that spouse immediately before her or his marriage to the insolvent or before the first day of October, 1926; or*
- (b) to have been acquired by that spouse under a marriage settlement; or*
- (c) to have been acquired by that spouse during the marriage with the insolvent by a title valid as against creditors of the insolvent; or*
- (d) to be safeguarded in favour of that spouse by section twenty-eight of this Act or by the Insurance Act, 1923 (Act No. 37 of 1923); or by the Insurance Ordinance, 1927 (Ordinance No. 12 of 1927 of the Territory), or*
- (e) to have been acquired with any such property as aforesaid or with the income or proceeds thereof. “*

Thus in terms of Section 21, the vehicle shall vest in the Master until such time a trustee is appointed of which the vehicle would then vest in the trustee of the insolvent estate. Mrs Solar will then as per the provisions of Section 21 (2), have to prove in good faith that there is a valid title against the creditors of the insolvent estate on the vehicle.

Assuming that the vehicle was registered in the name of Mr Solar, the vehicle will then fall part of the insolvent estate by virtue of the Mr Solars ownership and the valid title he has over the vehicle.]

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

Question 2.6

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

[Section 40 of the Insolvency Act 24 of 1936 states the following:

(1) *“On the receipt of an order of the Court sequestrating an estate finally, the Master shall immediately convene by notice in the Gazette, a first meeting of the creditors of the estate for the proof of their claims against the estate and for the election of a trustee.*

(2) *The Master shall publish such notice on a date not less than ten days before the date upon which the meeting is to be held and shall in such notice state the time and place at which the meeting is to be held.* ✓

(3)

(a) *After the first meeting of creditors and the appointment of a trustee, the Master shall appoint a second meeting of creditors for the proof of claims against the estate, and for the purpose of receiving the report of the trustee on the affairs and condition of the estate and giving the trustee directions in connection with the administration of the estate.*

(b) *The trustee shall convene the second meeting of creditors by notice in the Gazette and in one or more newspapers circulating in the district in which the insolvent resides or his principal place of business is situate.*

(c) *Whenever the notice referred to in paragraph (b) is published in any newspaper, the publication shall take place simultaneously in the Afrikaans language and in the English language and in the case of each such language in a newspaper circulating in the district referred to in the said paragraph which appears mainly in that language and the publication in each such language shall as far as practicable occupy the same amount of space: Provided that where in the district in question any newspaper appears substantially in both such languages publication in both such languages may take place in that newspaper.”*

The master convenes the first meeting in terms of Section 40 (1) upon receipt of a court order confirming the sequestrating the estate.

And as per Section 40 (2) the master shall publish such notice of the meeting on a date not less than ten (10) days before the date upon which the meeting is to be held. Such notice shall state the time and place at which the meeting will 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)**

[Section 80bis ✓states as follows:

“(1) At any time before the second meeting of creditors the trustee shall, if satisfied that any movable or immovable property of the estate ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation. ✓

(2) *The Master may thereupon authorize the sale of such property, or of any portion thereof, on such conditions and in such manner as he may direct: Provided that, if the Master has notice that such property or a portion thereof is subject to a right of preference, he shall not authorize the sale of such property or such portion, unless the person entitled to such right of preference has given his consent thereto in writing or the trustee has guaranteed that person against loss by such sale.”* √

Ms Abel is not allowed without Masters approval to sell the property of the estate. Ms Abel, upon written recommendation to the the Master and having been satisfied herself with the fact that the sale is necessary and that the assets be sold.

The Master may upon satisfaction of Ms Abels recommendation, authorise the sale of property before the second meeting on conditions that the Master has set. Since Ms Abel wants to osell assets prior to the second meeting, she will have to approach the Master of which the provisions of Section 18 (3) will apply and must be read with Section 80bis. In the event Ms Abel approaches the court first instead of the Master, in terms of Section 18 (3) the sale would in any event only take place upon notice and subject to the conditions that are 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:

[Ms Abel will have to obtain recognition as trustee from a competent court in Italy in order to gain control over the immovable property. √ As such Immovable properties situate outside the border of South Africa do not automatically vest in the insolvent estate. √ If Ms Abel fails to obtain this recognition the property shall vest in the insolvent, Mr Solar. √ This was confirmed in the case of *Hymore Agencies Durban v Gin Nih Weaving Factory 1959 (1) SA 180 (N)*.

For Ms Abel to exercise control over the property, the law and practice of the country in which the property is situate shall apply and have to be adhered to by Ms Abel. Italy is a party to UNCITRAL Model Law on cross-border insolvency which states that assistance will be afforded to Ms Abel, as a foreign representative not from Italy. The model law promotes cooperation with foreign courts and foreign representatives.] **3**

Question 2.8.2

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

[Yes. In the case of *Viljoen v Venter 1981 (2) SA 152 (W)* the court indicated that by virtue of common law the movable property shall vest in the insolvent estate if the estate is sequestrated by the court where the insolvent is domiciled. **2**

Mr Solar is domiciled within South Africa and the sequestration of his estate was ordered by a South African court as such the movable estate despite being located in a foreign country shall vest in the insolvent estate and not in the insolvent as it relates to immovable properties.]

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)

[A partnership is not a separate legal entity and does not have an existence separate to that of the individual partners. As such the partners are responsible for debts jointly and severally. As a result the partnership creditor can sue the partners individually. ✓

Section 13 (1) of the Insolvency Act requires that if the court sequestrates the partnership it must simultaneously sequester the estate of members of the partnership except for the partners not liable for the debts. ✓

If one partner in a partnership is declared insolvent, the firm is declared insolvent and is dissolved. The creditor can proceed to suing the remaining partners for the whole claim without joining the insolvent partner. If the court sequestrates the estate of a partnership, whether provisionally or finally the court is bound to also sequester the estates of every member of the partnership except for those partners who are exempted from such sequestration.] **2**

Question 2.9.2

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

[The sequestration of Mr Solar's estate will cause the partnership to dissolve/wind-up.] ✓ **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)**

[Commercial insolvency is when a debtor is unable to pay its debt due to cash flow √ or other problems but its assets still exceed its liabilities - this position does not mean that the debtor is insolvent for legal purposes. √

Factual insolvency is when the debtors liabilities exceed its assets. √

RNH is said to be commercially insolvent as per the facts. It is evident that RNH assets exceeded its liabilities in that RNH had enough movable assets for Rand First Bank to register a general notarial bond over as security, in favour of a loan. Further, from the facts the reason for RNH's failure to repay its creditors and suppliers is due to a severe energy crisis which has affected their production capacities. As a result RNH has been unable to meet customer demands which has resulted in the termination of contracts. √

Further RNH has raw material at the Durban harbour which would assist in their manufacturing process, however such process relies heavily on the power to operate the large machines due to the severe energy crisis. By virtue of the fact presented, it is evident that RNH is commercially insolvent as it is as a result of poor cash flow which was caused due to the severe energy crisis which in turn has resulted in RNH struggling to met customer demand thus impacting the cash flow within the company.] √ **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 liquidator] **Master then the liquidator**

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 the contract of employment will be suspended √and the employees will not be required to render their services to the company nor will the employees be liable to any remuneration. √The employment contract can be terminated by the liquidator in terms of Section 38 of the Insolvency Act.] 2

45 days?

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)

[Since the agreement will only expire in 2026, the lease agreement is referred to as a uncompleted contract. The Sequestration of a party does not terminate or modify a agreement however the trustee in the case of Bryant & Flanagan (pty) Ltd v Muller & Another the court stated that the trustee could elect to terminate the agreement. √However, the trustees election to not perform in terms of the agreement would merely consitutue a beach of contract which would entitle the solvent party to claim damages of which claim woud merely amount to a concurrent claim. √ This was confirmed in the case of Leviton & Son v De Klerk's Trustee 1914 CPD 685. 2]

Section 386(2) of the Companies Act 1973 deals with the effect of liquidation on a lease agreement (1) - the liquidator may, subject to the consent of the Master, at any time before a general meeting is convened for the first time, terminate any lease in terms of which the company is the lessee of immovable property (1) - if the liquidator does not terminate the contract the lease will, in any event, automatically be terminated three months after the appointment of the liquidator, (1) unless he notifies the lessor within those three months that he intends to continue with the contract - (1) in terms of the common law, the lessor of immovable property has a security right called a tacit hypothec, (1) over movables brought onto the leased property and over fruit and crops yielded by the property as security for the payment of arrear rental. (1)

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)

[Accordingly to Section 359 (1)(a) of the Companies Act 61 of 1973 provides for the suspension of civil proceedings until a liquidator is appointed .] 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)**

[Section 402 of the Companies Act 1973 states as follows:

“Except in the case of a members' voluntary winding-up, a liquidator shall, as soon as practicable and, except with the consent of the Master, not later than three months after the date of his appointment, submit to a general meeting of creditors and contributories of the company concerned a report as to the following matters:

(a) the amount of capital issued by the company and the estimated amount of its assets and liabilities;

√ (b) if the company has failed, the causes of the failure; √

(c) whether or not he has submitted or intends to submit to the Master a report under section 400 (2); √

(d) whether or not any director or officer or former director or officer appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company as provided in this Act; √

(e) any legal proceedings by or against the company which may have been pending at the date of the commencement of winding-up or which may have been or may be instituted; √

*(f) whether or not further enquiry is in his opinion desirable in regard to any matter relating to the promotion, formation or failure of the company or the conduct of its business; √ **6***

(g) whether or not the company has kept the accounting records required by section 284, and, if not, in what respects the requirements of that section have not been complied with;

(h) the progress and prospects of the winding-up; and

(i) any other matter which he may think fit or in regard to which he may desire the directions of the creditors or the contributories.”

The above section provides for the matters that Mr Hue can report on in this regard. Mr Hue is to properly assess the matters of the company in order to be able to report to the creditors. From the fact Mr Hue will be able to report on any legal proceedings that the company may be facing, whether in his opinion is it desirable for the company to continue trading, the progress and prospects of the winding up process, or any other matter he may deem fit like the employee salary pay outs etc.

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)**

[Sec 98A of the Insolvency Act is applicable in this instance as it applies to estates that have been sequestrated or provisionally sequestrated.

Section 98A(1)(a) √deals with employees that have been employed by the insolvent and what they are entitled to. Subject to amounts that have been determined by the Minister of Justice Employees have preference on the following:

- i. Any salary √ or wages for a period not exceeding three months, due to an employee – of which amount is up to a maximum of N\$ 12 000.00; √
- ii. Any payment in respect of any period of leave √ or holiday due to the employee which has accrued as a result of the employees employment by the insolvent in the yuear of insolvency of the previous year, or whether payment thereof is due at the date of sequestration -at the maximum amount of N\$ 4000.00; √
- iii. Any payment due in respect of any other form of paid absence for a period not exceeding three months prior to the date of sequestration of the estate – at a maximum amount of N\$ 4000.00; √
- iv. And severance or retrenchment pay due to the employee in terms of any law, agreement, contract or wage regulating measure – at the maximum amount of N\$ 12 000.00. The Insolvency Amendment Act 2002 expanded this preference to include severance or retrenchment pay as a result of the termination of contract of servi e in terms of Section 38 of the Insolvency Act. √

The employees as per the provisions of Section 98 A will have a statutory preferent right to claim for arrear salaries, leave and other paid absence and severance and retrenchment from the insolvent employer.] **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 requirements are that:

- i. The bond must be registered in terms of the Deeds Registries Act; √
- ii. The movable property must be corporeal (tangible); √
- iii. The movable property must be specified and described in the bond in a manner that renders it readily recognisable.] √ **3**

QUESTION 3.9

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

[Section 114 of the Customs and Excise Act √ 1964 provides SARS with a special security right to secure payment on certain import taxes (custom and excise duties). This security right is referred to as a lien in the Act. √Section 114 empowers SARS to detain imported property to which the import tax relates. √Once the property has been detained a lien vests over the property until the debts is paid. SARS in enforcing it lien over the property can seal, mark, lock, fasten impound or remove it to a place of security. By actioning the above methods SARS will then be a secured creditor over the assests. √

SARS will be regarded as a statutory preferent creditor and will be paid from the free residue of the estate. If SARS did not vest a lien before sequestration of the assets detained do not cover the full claim, SARS will be paid as statutory preferent creditor from the free residue.]√ **4**

QUESTION 3.10

Explain whether the Board of Directors will succeed in placing RNH into business rescue. In your answer discuss the concept of "initiation" of liquidation proceedings. Make reference to case law in your answer. **(5)**

[The Board of Directors in deciding at to whether the company should be placed under business rescue proceedings should have a reasoned and factual basis that the company can be rescued. This contention was supported in the case of *Kovacs Investments 571 (Pty) Ltd v Investec Bank Ltd and another; Investec Bank Ltd v Aslo Holdings (Pty) Ltd (25051/11, 18112/2011)* (2012 ZAWCHC 110 (22 February 2012)

The ways in which a company can be placed under business rescue is firstly by company resolution, also known as compulsory commencement and secondly by formal court application by a affected person which is also known as compulsory commencement. The commencement of the business rescue process leads to the appointment of a business rescue practitioner who is tasked to supervise the company.

According to Section 129 (1) of the Company Act of 2008, a companies board of directors can pass a resolution in terms of which the company resolves to commence the business rescue process. A business rescue practitioner who satisfies the requireements of the Companies Actof 2008 will then be appointed to the position. The resolution must be supported by majority directors and must be filed at the companies and Intellectual Properties Commission for the resolution to be of force and effect.

The board must have reasonable grounds to believe that the there are reasonable prospects of rescuing the company. A resolution cannot be adopted if liquidation proceedings have already been initiated by or against the company. This is so as to prevent boards from stopping bona fide liquidation applications by adopting resolutions for business rescue.] **1**

In this instance the Board will not succeed in placing the company in business rescue as liquidation proceedings have already been initiated (1). - Section 129 of the Company Act

1973 deals with resolution to begin business rescue proceedings - resolution contemplated in subsection (1) - may not be adopted if liquidation proceedings have been initiated by or against the company (1) - initiated deemed to be the filing and service of the application papers on the company - the resolution will be a nullity. (1) Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and Pan African Shopfitters (Pty) Ltd v Edcon Limited and others. (1)

*** END OF ASSESSMENT ***

30/40
TOTAL MARKS: [100]