



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.

MARKS AWARDED 92/100

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

19/20

**** 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)

The principle of *concursum creditorum* effectively indicates the coming together of creditors. The case of *Walker v Syfret* 1911 AD 141 illustrates the concept of the *concursum creditorum*, summarised as follows:

- The sequestration [or liquidation] order crystallises the insolvent's position and the hand of the law is laid upon the insolvent estate;
- Accordingly, and at once, the rights of the general body of creditors must be taken into account and the general interests of the creditors as a group is prioritised over the interests of any individual creditor. What this means, in essence, is that the rights of the group of creditors as a whole will take precedence over the rights of a particular creditor;
- Thereafter, no transaction can be entered into as regards the estate, to the prejudice of the general body of creditors.
- The claim of each creditor must be dealt with by the trustee / liquidator as it existed at the time of the granting of the sequestration / liquidation order. In other words, one creditor cannot (once sequestration / liquidation has commenced) receive full settlement of its claim at the expense of the claims of the other creditors. Creditors' claims must be paid in accordance with the order of preference as provided for by the law of insolvency (thus, no creditor is arbitrarily favoured).

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)

Ms Abel can avail herself of the remedy contained in section 29 of the Insolvency Act, 1936 which provides for the setting aside of a voidable preference.

A disposition is defined as the transfer or abandonment of rights to property (section 2 of the Insolvency Act). Such disposition by the insolvent (Mr Solar) can be set aside by the trustee (Ms Abel) if it appears that the insolvent favoured a particular creditor (in this case, Mr Hasty) by settling a pre-existing debt in full, despite being unable to pay the remainder of his creditors in full.

The trustee must prove the following:

- The disposition was made by the insolvent within 6 months prior to his sequestration;
- The effect thereof was seemingly to prefer one creditor above the rest; and
- Immediately after making the disposition, the insolvent's liabilities exceeded his assets (the value thereof at the date of the disposition).

In these circumstances, Ms Abel will likely succeed in having the disposition set aside due to the fact that:

- The disposition was made 1 month prior to the application for sequestration (thus within the requisite 6 months);
- The disposition preferred Mr Hasty over Mr Solar's other creditors such as Axit Finance; and
- In view of Mr Solar's poor financial situation at the time of settlement, Ms Abel will likely be able to prove that at the time of the disposition, Mr Solar's liabilities exceeded his assets.

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, 1936 sets out certain requirements that must be met by the applicant creditor, of which must be proved on a *prima facie* basis:√

- The applicant creditor must qualify as a creditor who is authorised to bring the application. In other words, he / she must have a liquidated claim against the insolvent estate in the sum of at least R100.00 (or at least R200.00 where there are joint applicants); √
- The debtor must be factually insolvent √ (his liabilities exceed his assets) or must have committed an act of insolvency (as provided for in section 8 of the Insolvency Act); and√
- It must be shown that there is reason to believe that the sequestration of the insolvent will be to the advantage of his / her creditors. √ 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 general position is that if an inheritance accrues before the rehabilitation of the insolvent (Mr Solar), the inheritance will fall into the insolvent estate (*Brown v Oosthuizen 1980 (2) SA 155 (O)*). However, the inheritance will only vest in the trustee (Ms Abel) on acceptance by the insolvent heir (Mr Solar).

In the case of *Wessels NO v De Jager NO 2000 (4) SA 924 (SCA)*, the Supreme Court of Appeal held that prior to the acceptance of an inheritance, the beneficiary had no rights to the inheritance but merely a "competence" to inherit. It therefore follows that even if Mr Solar refused to accept the inheritance, Ms Abel would not be able to set it aside as a voidable disposition.

In short therefore, the R500,000.00 inheritance will vest in the insolvent estate. 3

Question 2.4

For the purpose of this question, assume that Mr and Mrs Solar are married **in community of property** and their joint estate was sequestrated. Explain whether the pension pay-out of R600,000 that Mrs Solar receives will vest in the joint insolvent estate. In your answer refer to the applicable section of the Insolvency Act that applies. (2)

Section 23(7) of the Insolvency Act provides that the insolvent (Mrs Solar, in this instance) may for his or her own benefit, recover any pension to which he or she may be entitled for services rendered. Section 3 of the General Pensions Act 1979, provides that any benefit received under any pension law by the insolvent does not form part of the insolvent estate. Therefore, Mrs Solar's pension payout will not vest in the joint insolvent estate. However, the position would differ if the pension payout had occurred before sequestration of the joint 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)

This transaction can be classified as an ordinary credit transaction. As a consequence (and in accordance with the agreement entered into between Mr Solar and Mr Green), Mr Green has lost ownership of the vehicle. As such, the vehicle vests in the insolvent estate.

Mr Green will not be able to reclaim the motor vehicle despite a portion of the purchase price still outstanding. However, Mr Green will have a concurrent claim for the balance of the purchase price (R60,000.00). ✓ **4**

Question 2.6

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

The Master of the High Court will convene the first meeting of creditors once he / she receives the final order of sequestration. Notice of the intended meeting is placed in the Government Gazette at least 10 days before the date of the first meeting, as prescribed by section 40 of the Insolvency Act, 1936. **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)**

As Ms Abel is only a provisional trustee, she cannot sell the property of the estate without the requisite consent / authority of the Master. However, she can rely on section 80bis of the Insolvency Act which allows for an application to be made to the Master, ✓ requesting that the Master authorise the sale of the property, notwithstanding the fact that a second meeting of creditors has not yet been held.

It is important to note that if the property intended to be sold is subject to the rights of a secured creditor, ✓said creditor must give permission to the trustee to sell the property, which permission must accompany the application to the Master. ✓

If the Master grants the trustee consent to sell the property, the Master may prescribe terms and conditions as regards the sale of the property and the manner of the sale. ✓ **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:

Section 2 of the Insolvency Act, 1936 defines property as “movable and immovable property wherever situate in the Republic”. ✓

Immovable property, such as the property in Italy, is administered in terms of the law of the place where the property is situated (*lex rei sitae*), in other words, Italy. ✓

Accordingly, the immovable property will not automatically vest in the insolvent estate. Ms Abel will need to seek recognition of her appointment in Italy before she is able to properly deal with the immovable property. ✓ The procedures that Ms Abel will have to follow to be recognised to deal with the immovable property in Italy will depend on Italy’s laws and practices. ✓ It will be sufficient if she shows that she is of the *bona fide* view that proceedings should be instituted in Italy (*Gardener v Walters 2002 (5) SA 796 (C) 810H*). **4**

Question 2.8.2

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

Yes. ✓ The law as pertains to movable property is different in that it is subject to the same law as that which governs the owner of the movable property. In other words, the law of the owner’s domicile.

In summary, movable property of the insolvent which is situated in a foreign country will nevertheless vest in the insolvent estate if the estate is sequestrated by the Court where the insolvent is domiciled. Ms Abel will therefore not have to seek foreign recognition of her appointment. ✓ **2**

Question 2.9

Question 2.9.1

Assuming that Mr Solar traded Sum-It-Up Accounting as a partnership, briefly explain how the partnership and the partners are treated in terms of the Insolvency Act when a provisional sequestration order is granted. **(2)**

The common law identifies the assets of a partnership as indistinguishable from the assets of the partners. The partnership is not classified as a separate legal entity. ✓

The Insolvency Act, 1936 departs from the common law position and treats the assets / estate of a partnership as separate from the assets / estates of its partners. This means that the estate of a partnership can be sequestrated separately from the estates of its partners. ✓ **2**

Question 2.9.2

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

(1)

If the estate of a partner, namely, Mr Solar, is sequestrated, it does not necessarily mean that the partnership itself will be sequestrated, nor does it mean that the estates of the remaining partners need to be sequestrated. However, the effect of the sequestration of Mr Solar's estate (in his capacity as one of the partners) will cause the partnership to terminate. The partnership will be wound up in the ordinary course and the partnership assets distributed amongst the partners in accordance with the common law or agreement between the partners. Any assets which fall due to Mr Solar will form part of his insolvent estate.¹

33/40

**** 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)**

Factual insolvency is where the value of a company's liabilities exceeds its assets. ✓ For example, where the balance sheet indicates that the liabilities exceed the value of the company's assets. ✓

Commercial insolvency, ✓ on the other hand, is where a company is unable to pay its debts ✓ as and when they fall due. This is even so where the company's assets exceed its liabilities. For example, where a creditor of a company makes demand for repayment of an amount due and the company is unable to settle the sum or secure it to the satisfaction of the creditor, this is regarded as an act of commercial insolvency.

Based on the facts provided, and especially in light of the following acts of insolvency, I would say that RNH is commercially insolvent: ✓

- They need cash injections to purchase raw materials and are essentially borrowing from "Paul to pay Peter";
- They need additional funds to be able to meet their monthly expenses, such as their instalments on vehicles and trucks;
- They cannot pay creditors or suppliers in the ordinary course of business;
- Legal proceedings have been instituted against them, resulting in judgments which they cannot satisfy. **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)**

In terms of section 361(1) of the Companies Act, 1973, the company remains the owner of its assets / property and control of the property vests with the Master, and then the liquidator, once appointed. The custody and control of the assets will accordingly vest with

the Master and then the provisional liquidator (and then the final liquidator) once appointed. **1**

QUESTION 3.3

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

Section 38 of the Insolvency Act, 1936 provides that upon liquidation of an employer (RNH), all contracts of employment with its employees are suspended. ✓ In this case, the contracts of employment will be suspended from the date of the provisional order of liquidation. ✓

During the period of suspension of the contracts of employment, the employees will not be required to work, ✓ but will also unfortunately not be remunerated and will not be entitled to employment benefits. However, employees will be entitled to unemployment benefits in accordance with the Unemployment Insurance Act (1966).

After the (final) liquidator consults with employee representatives on measures to save the business or part thereof, the employees' contracts might be terminated. If not expressly terminated by the liquidator, and if no agreement can be reached on continued employment terms, the employees' contracts are automatically terminated 45 days after the final liquidator is appointed. ✓ **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)**

On the liquidation of a lessee (RNH), the liquidator may elect to abide by or cancel the lease agreement. It is important to note that the liquidator acts on the instructions of the creditors. ✓

Section 386(2) of the Companies Act, 1973 affords the liquidator the right to cancel a lease at any time before a general meeting is convened for the first time. ✓

If the liquidator elects to cancel the lease agreement, he must afford the lessor (The Willow Family Trust) written notice, in which case, the lessor will have a claim against RNH for damages for breach of contract. This will be a concurrent claim. RNH will forfeit any right to claim compensation for improvements to the leased premises. ✓

If the liquidator does not specifically terminate the lease agreement, the lease agreement will terminate automatically within 3 months of the appointment of the liquidator, unless the liquidator notifies the lessor that it intends to abide by the lease agreement. ✓

In the event the liquidator elects to abide by the lease agreement, the liquidator is bound by all the same terms and conditions of the lease agreement

The lessor (The Willow Family Trust) is protected somewhat in that it is afforded a hypothec over all movable property bought onto the property by the lessee (excluding property belonging to 3rd parties and subject to instalment sale agreements and mortgage bonds). The hypothec serves as security for payment of rental which was in arrears before RNH went into liquidation. Any rental that is due after liquidation enjoys a preference as part of the costs of liquidation. ✓

In short: the Willow Way Family Trust will have a secured claim for arrear rental pre-liquidation, and a preferential claim for rental due after liquidation, plus a concurrent for damages for breach of contract, should the liquidator elect to cancel the lease agreement. ✓ **6**

QUESTION 3.5

Briefly discuss the overall effect that the liquidation order of RNH will have on civil proceedings that have commenced against the company prior to the provisional order being granted. **(2)**

Section 358 of the Companies Act, 1973 provides for the stay of civil proceedings after presentation of the liquidation application. In accordance with this section, the company, a creditor or member thereof may apply to the Court concerned to stay any action or proceeding against a company, or apply to restrain any further proceedings from being instituted against the company, before the provisional order is granted. **2**

QUESTION 3.6

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

Mr Hue can discuss the following aspects in his report, in accordance with the provisions of section 402:

1. The amount of capital issued by the company and the estimated amount of its assets and liabilities (including all assets subject to securities, lease agreements, etc); ✓
2. If the company has failed, the causes of its failure (for instance, the loadshedding / energy crisis); ✓
3. Whether or not any director / officer or former director / officer appears to be personally liable for damages or compensation to the company or any debts or liabilities of the company (for example, due to reckless or negligent trading whilst knowing they did not have the funds to pay suppliers or creditors); ✓

4. Any legal proceedings by or against the company which may have been pending at the commencement of the winding up (for instance, the legal proceedings instituted by suppliers and creditors); ✓
5. Whether or not a further enquiry should be held in regard to any matter relating to the formation, promotion or failure of the company or conduct of its business (for example, if Mr Hue suspects that funds were being solicited from the business or assets disposed of); ✓
6. The progress and prospects of winding up. ✓ **6**

QUESTION 3.7

MAWU ask Mr Hue to explain the statutory preferent right of the employees to claim for arrear salaries, and other amounts) owing to them. Write a short paragraph advising MAWU of the position. **(5)**

In terms of section 98A ✓ of the Insolvency Act, 1936 any employer employed by the liquidated company is entitled, subject to a maximum amount as determined by the Minister of Justice, to a preference (preferential claim) for the following amounts:

- 3 months' arrear salary, subject to a maximum of R12,000.00. ✓ The balance of the the employee's unpaid salary will be a concurrent claim;
- Unpaid leave owing to the employee, subject to a maximum of R4,000.00. The balance of the claim will likewise be a concurrent claim; ✓
- Any payment due to the employee for any other form of paid leave for a maximum period of 3 months and not exceeding R4,000.00; ✓
- Any severance of retrenchment pay not exceeding R12,000.00. ✓

It is important to note that the first claim for unpaid arrear salaries has preference over the remaining 3 types of claims, which rank equally and proportionally.

If the employees' contracts are terminated by the liquidator, they will also each be entitled to an unliquidated concurrent claim for damages due to the early termination of their contracts. ✓ **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)**

1. The bond must be registered in terms of the Deeds Registries Act; ✓
2. The movable property must be corporeal (i.e. tangible); and ✓
3. The movable property must be specified and described in the bond in such a manner as to render it readily recognisable. This means that third parties must be able to identify the property listed in the bond without having regard to extrinsic / external evidence. ✓ **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)**

Certain special statutory protections can be created by pieces of legislation, other than those provided for by insolvency law. Section 114 of the Customs and Excise Act, 1964 is one such piece of legislation which ranks SARS as a secured creditor for payment of import taxes / customs and excise duties. The security right vested in SARS is created by a lien, which operates akin to a pledge. In accordance with section 114, SARS is entitled to detain the imported property in respect of which import taxes are owing, effectively creating a lien until the taxes are paid. The lien can be exercised by SARS "sealing, marking, locking, fastening or otherwise securing or impounding it (the property) on the premises where it is found or removing it to a place of security" (section 114(2)(a)). **4**

In these circumstances, SARS will be a secured creditor.

However, if the goods detained do not cover SARS' full claim, or in the event that SARS does not exercise the lien, SARS is still afforded a statutory preference and will be paid from the free residue of the estate.

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 is empowered by section 129(1) of the Companies Act, 2008 to pass a resolution to place the company into business rescue. The resolution must be supported by the majority of directors (subject to any higher requirement imposed by the memorandum of association).

In order to succeed with the voluntary business rescue, the board must have reasonable grounds to believe that the company is financially distressed and that there appears to be a reasonable prospect of rescuing the company.

To answer these questions, the board must take into account the surrounding circumstances, both from a subjective standpoint (their own view) and an objective standpoint (the view of a reasonable director).

What is important to note is that a board of directors are prevented from adopting the resolution if liquidation proceedings have already been "initiated" "by or against the

company”(own emphasis). Furthermore, the resolution to commence business rescue is of no force and effect until it is filed with the CIPC. ✓

To determine whether or not these restrictions find application in these given circumstances, one must establish the meaning of “initiated” and “by or against the company”. ✓

In the case of *Tjeka Training Matters (Pty) Ltd v KPMM Construction (Pty) Ltd and Others 2019 (6) SA 185 (GJ)*, ✓Sutherland J held that liquidation proceedings as contemplated in section 129 need to be served (and not merely issued) on a company in order to comply with the meaning of the section. This position was reiterated in the case of *Pan African Shoplifters (Pty) Ltd v Edcon Limited and Others*. ✓

Turning now to the facts of this matter: the liquidation papers were served on an employee of the company on 11 February 2023. The liquidation proceedings were accordingly initiated on 11 February 2023. The board only passed the resolution on 12 February 2023, which resolution only became effective once filed with the CIPC on 14 February 2023. The liquidation proceedings were thus initiated before the board filed the resolution. The company is thus precluded from adopting the resolution and / or the resolution needs to be withdrawn / set aside. ✓

Whilst some argument could be made by the board that the liquidation papers were not brought to their attention by the employee, I do not think this argument would hold much sway in a Court of law. **5**

40/40

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

TOTAL MARKS: [100]