



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 85/100

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)

Once a sequestration order is granted, the law proceeds from the premise that a coming together of the creditors is established (the *concursum creditorum*),¹ in that the interests of the creditors as a group enjoy preference over the interests of individual creditors.

In *Walker v Syfret* 1911 AD 141 at 166, this concept was explained as follows: √
'The sequestration order crystallises √ the insolvent's position; the hand of the law is laid upon the estate, and at once the rights √ of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order.' √

Because essentially everything involving the sequestered estate comes to a complete standstill (contractual transactions, executions of orders, set-off etc.) while the estate divests from the debtor, to the Master and then to the trustee (upon their appointment) - for purposes of securing the realisation of the remaining assets of the insolvent and to ensure the distribution of the estate in terms of the applicable insolvency law.

Creditors of the estate are dealt with in order of preference as set out in the Insolvency Act 24 of 1936, after proving their claim against the insolvent estate. 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

¹ Robert Sharrock et al. Hockly's Law of Insolvency (2006 8th ed) Juta & Co. Ltd at page 4.

his claim. In your answer refer to the relevant section of the Insolvency Act that will apply and what requirements must be met. (7)

The delivery of the antique clock in full and final settlement in favour of Mr Hasty can be categorised as a disposition preferring one creditor above other creditors in which Mr Hasty received full payment to settle the loan debt (ie a voidable preference). Section 29(1) of the Insolvency Act provides that:

'Every disposition of his property made by a debtor not more than six months before the sequestration of his estate or, . . . 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 asstes, 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.'

Ms Abel may apply section 29(1) by approaching the court to have the disposition set aside. She however carries the burden of proving that:

A disposition of his property by the insolvent debtor (Mr Solar);

That the disposition was made within six months before the date of sequestration (in Mr Solar's case, the disposition was made on 5 December 2022, and the provisional order of sequestration was granted on 15 January 2023 and made a final order on 20 February 2023 which is with the six months before the date of sequestration);

That the effect of the disposition was to prefer one creditor above others (Mr Hasty was treated differently compared to Mr Solar's other creditors); and,

That immedietly after the making of the disposition, the debtor's liabilities exceeded the value of his assets. To prove this requirement, Ms Abel does not have to prove beyond a reasonable doubt, but simply upon a preponderance of probabilities.²

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)

² Mars, *The Law of Insolvency in South Africa*, E Bertelsmann et al (Juta, 9th ed) page 259-260.

The applicant creditor (Axit Finance) must in terms of section 10 of the Insolvency Act meet the following requirements:

(a) That the petitioning creditor has established against the debtor a claim such as is mentioned in section 9(1) of the Insolvency Act. ✓

(b) The debtor has committed ✓ an act of insolvency or is insolvent; and; ✓

(c) That there is a reason to believe that sequestration would be to the advantage of creditors. ✓

In applying these requirements to the facts before us:

Axit Finance must rely on one or more of the above grounds³ in their sequestration application. They must alledge in their founding papers that they, as a creditor, have established a claim against Mr Solar for the required amount as stipulated in section 9(1) of the Insolvency Act (state the particular amount they are owed), cause and nature of the claim (ie money lent to Mr Solar). Axit must further alledge that the debtor has committed any one or more acts of insolvency. (If Axit Finance is aware of Mr Solar's delivery of the antique clock to Mr Hasty, - they can alledge that an act of insolvency was committed (ie section 8(c) when 'he [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 of preferring one creditor above another). Finally, they must alledge that the debtor's estate is in fact insolvent. If the court is satisfied that the creditor has proved these requirements, it may make an order sequestrating the estate of the debtor provisionally. ✓ **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) of the Insolvency Act provided that the estate of an insolvent:

(a) shall 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 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 23.

An inheritance, which accrues before the rehabilitation of the insolvent, as is the case with Mr Solar, falls into the insolvent estate. A testator cannot prevent the inheritance from forming part of the insolvent estate of his heir by merely directing that the bequest shall form part of the insolvent estate (a *nudum praeceptum*). This can only be achieved if the testator includes a provision directing that if the heir is an unrehabilitated insolvent at the

³ Mars, *The Law of Insolvency in South Africa*, E Bertelsmann et al (Juta, 9th ed) page 115-116.

time of the testator's death, the bequest must accrue to another person – *Vorster v Steyn* 1981 (2) SA 831 (O).

If an heir repudiates an inheritance either before or during the insolvency of that heir, the inheritance will be excluded from that insolvent estate. This position was confirmed *Wessels NO v De Jager NO* 2000 (4) SA 869 (C) where the Supreme Court of Appeal found that prior to the acceptance of an inheritance or insurance benefit, the beneficiary had no rights to the benefits, but merely a 'competence' to inherit.

In this case, Mr Solar accepted the inheritance on 1 May 2023 which qualified the inheritance to 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)**

In terms of section 23(7) of the Insolvency Act:

'The insolvent may for his own benefit recover any pension to which he may be entitled for services rendered by him.' **2**

This position is reinforced in section 3 of the General Pensions Act 29 of 1979 which provides that 'annuity received under any person whose estate is sequestrated shall not form part of the assets in his insolvent estate'.

Further, section 37B of the Pension Fund Act 24 of 1956 provides that:

'If the estate of any person entitled to a benefit payable in terms of the rules of a registered fund . . . is sequestrated or surrendered, such benefit or any part thereof which became payable after the commencement of the Financial Institutions Amendment Act, 1976 (Act 101 of 1976), shall, subject to a pledge in accordance with section 19(5)(b)(i) and subject to the provisions of sections 37A(3) and 37D, not be deemed to form part of the assets in the insolvent estate of that person and may not in any way be attached or appropriated by the trustee in his insolvent estate or by his creditors. . .'

The Supreme Court of Appeal in *M and another v Murry and others*⁴ confirmed that: Thus all that s 37B entails is that, while in the hands of a pension fund, the insolvent's pension interest cannot be attached by his or her trustee on the basis that it forms part of the insolvent's assets. It protects only the pension benefit of a person(s) whose estate is (already) sequestrated (when he received his pension pay-out). Section 37B seeks to establish an exception to the provisions of s 20(1)(a) of the Insolvency Act.⁵

⁴ 2020 (6) SA 55 SCA para 16.

⁵ *M and another v Murray and others* paragraph 16.

Although a date for her resignation does not appear in the facts, and assuming that she resigned after the final order of sequestration was granted, Mrs Solar received her pension benefit after their joint estate was sequestrated and applying the provisions of the relevant legislation cited above, her pension benefit will not form part of the insolvent estate, thus it will not vest in the trustee.

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)**

Per section 21(1) ownership of the vehicle shall vest in the Master and thereafter in the trustee upon their appointment. This position is however not meant to be permanent as the insolvent spouse (Mrs Solar) may secure the release of the vehicle as it falls in one of the categories contained in section 21(2) of the Insolvency Act⁶. 'Section 21 was introduced to prevent collusion between spouses to the detriment of the creditors of the insolvent estates - in particular to make it difficult for the insolvent and his spouse to deprive the estate of assets to which it is entitled by pretending that they are the separate property of the solvent spouse'.⁷

In this case, if Mrs Solar can show that there is no collusion between her and her insolvent husband for purposes of depriving the insolvent estate, she would be entitled to rely on section 21(2)(c) of the Insolvency Act read with section 22 of the Matrimonial Property Act 88 of 1984 by claiming that the vehicle was genuinely donated to her by her husband and it forms part of her assets acquired during the marriage with the insolvent by a title valid as against the creditors of the insolvent. She must however prove that that donation was made in good faith.

Considering that the Hyundai i20 was purchased in terms of an ordinary credit sale agreement, Mr Green will not be entitled to reclaim the vehicle in terms of section 36 of the Insolvency Act because ownership of the vehicle had passed on delivery (and also because Mrs Solar has proved a valid title against the creditor of the insolvent spouse. Assuming that Mrs Solar's section 21(2)(c) of the Insolvency Act claim were to fail in the event of collusion being proved - the vehicle would vest in the insolvent estate per section 20(1)(a) of the Insolvency Act). However Mr Green will have a concurrent claim for the balance of the purchase price. **1**

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

⁶ Hockly's Law of Insolvency at page 71.

⁷ Hockly's Law of Insolvency at page 71.

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)

In terms of section 40(1) of the Insolvency Act, upon receipt of an order sequestrating an estate finally, the Master shall immediately convene the first meeting of the creditors of the estate.

Section 40(2) of the Insolvency Act provided that the first meeting of creditors must be published by notice in the Government Gazette, 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 date at which the meeting is to be held. 2

Question 2.7

Ms Abel urgently needs to sell the movable assets of the insolvent estate, claiming that the sale cannot wait until she receives instructions from the creditors at the second meeting. What steps would Ms Abel need to take in order to sell the assets prior to the second meeting of creditors? Support your answer by referring to the necessary statutory provisions. (4)

Ms Abel would have to approach the Master, recommending in writing the need to sell the asset prior to the second meeting of creditors. She would be guided by section 80bis of the Insolvency Act provides that:

'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'. √The Master may 'thereupon authorise the sale of such property...on such conditions and in such manner as he may direct. . .' in terms of section 80bis(2) of the Insolvency Act.√

If Ms Abel is a provisional trustee, although having the same powers and duties as a trustee, she would have to obtain authority to sell any property belonging to the insolvent estate from the court or the Master in terms of section 18(3) read with section 80bis of the Insolvency Act. √

(Ms Abel would also be able to sell section 386(2A) and (2B) of the Companies Act if she was appointed as a liquidator of an insolvent company). √ 4

Permission by secured creditor

Question 2.8

Question 2.8.1

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

The immovable property in Italy does not automatically vest in the trustee insolvent estate – the property will remain vested in the insolvent⁸. This is because immovable property is governed by the law of the place where the immovable property is situated (the *lex situs*) – *Moolman v Builders & Developers (Pty) Ltd (in Provisional Liquidation): Jooste intervening* 1990 (1) SA 954 (A) 960. The trustee must apply for a letter of request at a local court before approaching the foreign court.⁹ This is a request by a local court to assist the South African trustee.¹⁰ Once the local court issues an order requesting assistance, Ms Abel will be required to file with the relevant Italian court ‘a request by a South African court that the foreign court recognise the South African trustee. . .’.¹¹

For the trustee (Ms Abel) to succeed in her pursuit of the property in Italy and gain control of such property, she would first have to convince the court in South Africa that she has reasonable prospects of success – as it was required in *Ex Parte Wessels and Venter NNO: in re Pyke-Nott’s insolvent Estate* 1996 (2) SA 677 (O), where the court refused to grant an order requesting assistance from the courts of England because the applicants failed to show ‘reasonable prospects of success that an examination of witnesses and documents in England may lead to the discovery of further assets in the insolvent estate’.¹²

√ 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)

The position is different if the property located in a foreign country is a movable property. According to *Viljoen v Venter* 1981 (2) SA 152 (W) at 155B-C, the court found that at common law ‘there is abundant authority, both South African and foreign, that an insolvency order granted by a Court of the insolvent’s domicile will vest foreign movables in his trustee’. √ 2

Question 2.9

⁸ Mars, *The Law of Insolvency in South Africa*, E Bertelsmann et al (Juta, 9th ed) at 663.

⁹ Michele Olivier and Andre Boraine Some aspects of international law in South African cross-border insolvency law, Sabinet African Journals (2006) https://journals.co.za/doi/pdf/10.10520/AJA00104051_42, accessed 24 November 2023.

¹⁰ SARIPA Course Notes (Insolvency) 2023, Chapter 26, Partnerships, at page 327.

¹¹ Mars, *The Law of Insolvency in South Africa*, E Bertelsmann et al (Juta, 9th ed) at 671-672.

¹² *Ex Parte Wessels and Venter NNO* at 680J-681A.

Question 2.9.1

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

The Insolvency Act 1936 has 'so far as insolvency matters are concerned, departed from the common law and treats a partnership as having a separate estate for most purposes and as being generally in the same position as other individual debtors'¹³.

By virtue of section 13(1) of the Insolvency Act when the 'court sequesters the estate of a partnerships, it will simultaneously sequester the estate of every member of that partnership other than a partner en commandite or a special partner. . . √ Provided that if a partner has undertaken to pay the debts of the partnership within a period determined by the court and has given security for such payment to the satisfaction of the registrar, the separate estate of that partners shall not be sequatrated by reason only of the sequestration of the estate of the partnership'. √ **2**

Question 2.9.2

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

The insolvency of a partner of a partnership (Mr Solar) has the effect of dissolving/terminating the partnership, as a consequence, the partnership will have to be wound-up or liquidated.¹⁴ **1**

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**** END OF QUESTION 2 ****

QUESTION 3 FOLLOWS ON NEXT PAGE / ...

¹³ Mars, *The Law of Insolvency in South Africa*, E Bertelsmann et al (Juta, 9th ed) at page 594. Also see SARIPA Course Notes (Insolvency) 2023, Chapter 32, Cross-Border Insolvency, at page 421.

¹⁴ SARIPA Course Notes (Insolvency) 2023, Chapter 26, Partnerships, at page 327-328.

PART 3 - LIQUIDATION (40 MARKS)

QUESTION 3

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

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

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

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

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

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

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

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

QUESTION 3.1

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

In *Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd* 2014 (2) SA 518 para 16, the court defined and distinguished the two concepts as follows: √

'Factual insolvency: refers to where a debtor's liabilities exceeds his assets. √

Commercial insolvency: refers to a situation where a company is in such a state of illiquidity that it is unable to pay its debts.' √

Based on the facts provided, RNH is commercially insolvent because it is experiencing cash shortfalls hindering its ability to repay creditors and suppliers which has resulted in legal actions and judgments against the company, increasing the possibility of liquidation. √ **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)**

Custody and control of the assets vests in the Master and then in the liquidator. **1**

QUESTION 3.3

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

According to section 38 of the Insolvency Act (which find application by virtues of section 339 of the Companies Act on 1973), contracts of service of employees whose employer is

under liquidation are suspended ✓with effect from the date of the granting of a provisional or final liquidation order (if no provisional order was granted).¹⁵

The employees will also during the period of suspension of their employment, per section 38(2) of the Insolvency Act:

- (a) 'not be required to render services in terms of the contract and is not entitled to any remuneration in terms of the contract'; ✓
- (b) no employment benefit accrues to the employee'.

The employees of RNH will however have an unliquidated concurrent claim against the company for damages due to breach of contract. And they will, according to section 38(3) of the Insolvency Act, be 'entitled to unemployment benefits in terms of section 35 of the Unemployment Insurance Act 30 of 1966'. **2**

Terminated 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)**

In terms of section 386(2) of the Companies Act of 1973, ✓ 'subject to the consent of the Master, a liquidator may at any time before the general meeting contemplated in subsection 1(d✓) is convened for the first time, terminate any lease in terms of which the company is the lessee of movable or immovable property'. ✓

Section 37(1) of the Insolvency Act will become applicable in favour of The Willow Family Trust that will have a claim from the estate, for compensation for any loss which it may have sustained by reason of the non-performance of the terms of such lease. ✓ **4**

QUESTION 3.5

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

Section 359(1)(a) of the Companies Act 1973 provides that 'all civil proceedings by or against the company concerned shall be suspended until the appointment of a liquidator'.

2

¹⁵ Alao see *Ngwato v Van der Merwe NO* (2014/28470) [2016] GJ (6 May 2016) para 61.

Section 359(1)(b) of the Companies Act 1973 states that 'any attachment or execution put in force against the estate or assets of the company after the commencement of the winding-up shall be void'.

Section 359(2)(a) 'Every person who, having instituted legal proceedings against a company which were suspended by a winding-up, intends to continue the same, and every person who intends to institute legal proceedings for the purpose of enforcing any claim against the company which arose before the commencement of the winding-up, shall within four weeks after the appointment of the liquidator give the liquidator not less than three weeks' notice in writing before continuing or commencing the proceedings.

(b) If notice is not so given the proceedings shall be considered to be abandoned unless the Court otherwise directs'.

Essentially, all civil proceedings against or by RNH are stayed pending the appointment of a liquidator in whom power and control vests.

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 of 1973 provides that:

'Except in the case of a members voluntary winding-up, a liquidator must, not later than three months after his appointment, submit a report to a general meeting of creditors which report must deal the folloing:

(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**

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)**

The balance of the free residue is applied to paying certain salaries, √wages or other remuneration of employees of the insolvent and certain contributions that the insolvent in their capacity as an employer has to make to the pension, provident, medical aid sick pay, holiday unemployment or training scheme or fund or any other similar scheme or fund of their employees. These are preferent amounts that are payable in terms of section 98A(1)(a)(i-iv) of the Insolvency Act that RNH's employees are entitled to. This section provides the following: √

'(a) Any salary or wages due to an employee, for a period not exceeding three months, to a maximum of R12 000; √

(b) Payment in respect of leave or holiday due to the employee, to a maximum of R4 000; √

(c) Any payment due in respect of any other form of paid absence for a period not exceeding three months prior to date of sequestration, to a maximum of R4 000; √

(d) Any severance or retrenchment pay due to the employee in terms of any law, agreement, contract, wage-regulating measure, or as a result of termination in section 38, to a maximum of R12 000.'

Section 98A(4) provides further that the claim contained in section 98A(1)(a)(i) shall be preferred to the claims in section 98A(1)(a)(ii-iv).

If there is a balance of unpaid salaries for RNH's employees, that balance will become a concurrent claim the employees will be entitled to share in the balance of the free residue.

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)**

According to section 1 of the Security by Means of Movable Property Act 57 of 1993, the following requirements should be met for the special notarial bond to confer a right of preference:

1. The notarial bond must be registered in accordance with the Deeds Registries Act 47 of 1937; ✓
2. The notarial bond must be hypothecating corporeal movable property; ✓
3. Which property must be specified and described in the in a manner which 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 of 1964 ✓ establishes a lien or right of retention in favour of the South African Revenue Services (SARS). According to Mars: The Law of Insolvency in South Africa:

'Where any amount of any duty , interest, penalty or forfeiture incurred under the Customs and Excise Act is due, the Commissioner for Customs and Excise may impound goods in any customs and excise warehouse. . . ' ✓ to which import tax relates to such property until the debt is paid.¹⁶ ✓

The consequence of the lien over the assets under their control is that SARS becomes a secured creditor, in that its claim enjoys priority over others claims and may be enforced by sale or other proceedings if the debt is not paid¹⁷.

Under section 99(1)(b) of the Insolvency Act, a statutory obligation is created for the claim of money owed to SARS in taxes which ranks lower in preference and is paid out from the free residue of the insolvent estate. ✓ **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)**

Business rescue proceeding by the board to commences in terms of section 129(1) of the Companies Act of provides that subject to subsection 2(a):

¹⁶ Mars, *The Law of Insolvency in South Africa*, E Bertelsmann et al (Juta, 9th ed) at page 456. Also see SARIPA Course Notes (Insolvency) 2023, Chapter 21, Secured Creditors, at page 269.

¹⁷ Mars: The Law of Insolvency in South Africa at 456.

'the board of a company [by simple majority] may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that-

- (a) the company is financially distressed; and
- (b) there appears to be a reasonable prospect of rescuing the company'.

In order for this resolution to be of force and effect, it must be filed with the Companies and Intellectual Property Commission (CIPC).¹⁸

Section 129(2)(a) provides that:

'A resolution contemplated in subsection (1)-

- (a) may not be adopted if liquidation proceedings have been initiated by or against the company. . . ' √

In two recent cases on the concept of "initiation" of liquidation proceedings, *Pan African Shopfitters (Pty) Limited v Edcon Limited and others*¹⁹ Meyer J concurred with the finding by Sutherland J in *Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and others*²⁰ at paragraph 22 that: √

'[t]he liquidation proceedings contemplated in s 192(2) of the [Companies] 2008 Act must be served on the company, not merely issued, to meet the requirements of the section'. √

The facts of our case provide that RNH's Board of Director resolved to commence business rescue proceedings on 12 February 2023 and their resolution was lodged with CIPC on 14 February 2023. In the meantime, an aggrieved creditor of RNH had already initiated liquidation proceedings against RNH which was filed and served by the Deputy Sheriff of the High Court on an employee of RNH on 11 February 2023 (the employee placed the application in his desk draw and the Board never had sight of it - they were thus unaware that liquidation proceedings have already been initiated against the company). The provisions under section 129(2) Companies Act of 2008 applied to these facts would result in the effect and force of resolution to place RNH under business rescue to be quashed as the aggrieved creditor initiated and served *bona fide* liquidation proceedings against the company prior to the resolution being made and filed with CIPC. The two requirements must always be kept in mind to determine whether a board can commence voluntary business rescue proceedings or not. √ **5**

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

¹⁸ SARIPA Course Notes (Insolvency) 2023, Chapter 28, Business Rescue, at page 370-371.

¹⁹ (10652/2020) [2020] ZAGPJHC 158 (10 July 2020).

²⁰ 2019 (6) SA 185 (GJ).

TOTAL MARKS: [100]