



INSOL
INTERNATIONAL



PROGRAMME IN SOUTH AFRICAN INSOLVENCY LAW AND PRACTICE 2023

Summative Assessment (Examination): Paper 1

Date: 23 - 24 November 2023

Time limit: 24 hours (from 13:00 SAST on 23 November to 13:00 SAST on 24 November 2023)

EXAMINER

Ms B Bennett

MODERATORS

Ms R Bekker Dr D Burdette Ms J Calitz Mr Z Cassim Mr E Levenstein

It is imperative that all candidates read and take cognisance of the examination instructions on the next page.

All candidates are expected to comply with ALL the instructions.

MARK AWARDED 84

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. X

(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.X
- (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. X

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".X

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) FalseX

Question 1.19

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

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

Question 1.20

Select the **correct** statement:

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

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

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**** END OF QUESTION 1 ****

QUESTION 2 FOLLOWS ON NEXT PAGE / ...

PART 2 - SEQUESTRATION (40 MARKS)

QUESTION 2

Questions 2.1 - 2.9 are based on the set of facts provided below. Answer ALL the questions.

Mr and Mrs Solar were married to each other out community of property in 2012. They reside in a four-bedroom property in an upmarket country estate on the beautiful east coast in Ballito, KwaZulu-Natal. The immovable property is subject to a mortgage bond in favour of ABC Bank. The marital home is fully furnished and the Solar's acquired some beautiful luxury and antique furnishings during the course of their marriage. In the latter part of 2021 Mr Solar donates a valuable and timeless Victorian sofa and server to his wife which she proudly exhibits in the home. The remaining furniture and antiques have been paid for in cash, apart from the photocopier in the home office which is subject to a lease agreement concluded with Speedy Copiers (Pty) Ltd by Mr Solar.

Mr Solar also owns a small apartment in Florence, Italy where the family enjoy spending their annual holiday.

Mr Solar drives a 2022 BMW X5 which was purchased on instalment sale agreement and financed by FCM Vehicle Finance Ltd. Mrs Solar drives a 2016 Hyundai i20 which Mr Solar purchased from Mr Green in terms of an ordinary credit sale agreement. The agreement was concluded on 5 August 2022. Mr Solar paid a deposit in the sum of R20,000 and by agreement ownership in the vehicle had passed on delivery. The balance of R80,000 is due to be paid by way of monthly instalments of R10,000 each until the balance is paid, to date, Mr Solar has paid R40,000 in terms of the agreement.

On 5 December 2022 and after being pressured by Mr Hasty, an irate creditor who loaned Mr Solar money, Mr Solar delivers one of his valuable antique clocks to him to settle his debt in full.

On 5 January 2023 an application for the sequestration of the estate of Mr Solar is filed in the KwaZulu-Natal High Court Division, Durban at the instance of Axit Finance in respect of an unpaid personal loan. Mr Solar's estate is provisionally sequestrated on 15 January 2023 and the order is made final on 20 February 2023.

On the date of sequestration Mr Solar is a director of an accounting firm, Sum-It-Up (Pty) Ltd and earns a generous salary of R120,000 per month. Mrs Solar works at the local high school as a teacher and earns R25,000 per month.

Two months after the final order of sequestration is granted, Mr Solar inherits R500,000 from his father, which inheritance he accepts on 1 May 2023. Mrs Solar decides to resign from her position at the local school and receives a pension pay out of R600,000. Mr Solar has a life-insurance policy in terms of which he is the life insured. The surrender value of the

policy is R800,000 and the policy has been in force from 1 February 2018. In December 2022 a job opportunity as a sales representative, earning an average income and just sufficient for Mr Solar to support his family, becomes available to Mr Solar and the Solar family decide to relocate to Gauteng.

Ms Abel is appointed as the provisional trustee of Mr Solar's estate and the trustee's appointment is made final at the first meeting of creditors on 10 April 2023. The second meeting of creditors is held on 5 June 2023. Axit Finance fails to lodge its claim at either the first or second meeting and approaches Ms Abel on 6 September 2023 to prove its claim.

Question 2.1

On the date of the sequestration order of Mr Solar, the principle known as *concursum creditorum* will apply. Explain the concept of *concursum creditorum* and how this will affect the creditors of the estate. In your answer refer to relevant case law. (4)

Concursum creditorum refers to a "coming together" of the creditors, √ the rights of the group of creditors is stronger as opposed to the rights of any individual creditor. √ The assets of the insolvent therefore must be split in pro rata share between the creditors in order of preference as laid down √ by law, once a creditor cannot receive full settlement of his claim and others receive nothing.

In the case of *Walker v Syfret*, √ the court set out the key concept of *concursum creditorum*, the general body of the creditors must be taken into consideration, no single creditor may enter into an agreement that will prejudice the general body of the creditors.⁴

Question 2.1

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

Voidable Preference

In terms of Section 29(1) of the Act, a disposition may be set aside if the Debtor was not able to pay all his creditors in full before his estate got sequestered.

Mr Solar delivered the clock to Mr Hasty in full and final settlement less than 6 months before sequestration. The following must also be proved:

- That the disposition was made by the insolvent within 6 months prior to sequestration.

- That the effect of the disposition was to prefer one creditor above the others, therefore not treating all creditors equally.
- That immediately after making such disposition the debtors liabilities exceeded the value of his assets..

UNDUE PREFERENCE =S 30 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)**

For a provisional order to be granted the following must be proved:

- Petitioning creditor has established against the debtor a liquidated claim√ not less than R 100 if two or more a liquidated claim of not less than R 200√
- Debtor has admitted an act of insolvency√ or is insolvent√
- There is reason to believe that it will be advantageous for the creditors if the estate of the debtor is sequestered. √ **5**

Axit Finance meet the requirements to to seek the provisional order.

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)**

Any inheritance that accrues before rehabilitation of an insolvent will vest in the insolvent estate. √The debtor must have accepted the inheritance which Mr Solar did on the 1st of May 2023. √

In *Wessels No V De Jager* √the above is set out. Should he not wanted the inheritance to fall into the estate and ultimately to the creditors he had to repudiate. **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 sequestered. 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 her own benefit recover pension to which she may be entitled to for services rendered. ✓

Mrs Solar's pension benefit will therefore not form part of the estate. *M and Another v Murray NO and Others 2020* 2

Question 2.5

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

The car that Mrs Solar drove will fall in the estate of the insolvent, ✓the car was purchased on a credit sale ✓ and full payment has not been made prior to sequestration ✓

As a general rule ownership of the car will vest with the debtor from date of delivery. ✓ Mr Green will have a concurrent claim for the balance of the purchase price. ✓ 4

Question 2.6

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

On receipt of the final sequestration order, the Master ✓ is obliged to convene the first meeting immediately by Notice in the Government Gazette in terms of section 40(1) ✓

The advertisement must appear not less than 10 days before the meeting and must state the time, date and place where the meeting will be. 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)

A Provisional trustee may not without the authority of the Master sell property of the estate. ✓

The Master may at any time before the second meeting of creditors authorise a sale of property, the Master may direct the manner and conditions of the sale. ✓

Mrs Abel if satisfied that the movable property must be sold before direction from the creditors at the second meeting, must in writing make a recommendation to the Master according to section 80bis(1) read together with section 18(3). ✓

She must also state and motivate why it is necessary to sell the assets at this stage and only proceed with the sale after the notices given and as per conditions of the Master. **3**

Permission of secured creditor

Question 2.8

Question 2.8.1

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

Answer:

The trustee will seek to recover all assets, whether situated within or outside of South Africa. , the procedure she will have to follow will depend on the law and practice of that country.

Immovable property is administered in terms of the *lex rei sitae*, the law of the place where the property is situated, in this instance Italy. ✓

Mrs Abel will have to consult experts on foreign law, these may be experts in Italy or local attorneys that have dealt with similar matter. As the property will not vest in the estate automatically Mrs Abel will have to provide that it does. ✓ **2 recognition on foreign court**

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 answer will be different. ✓ When it comes to movables the principle of international private law applies. It will be the same as the law of a person's *domicile*. ✓ **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)**

A Partnership is not a legal entity having an existence separate from the individual partners. Insolvency Act treat for the most part partners and the partnership as separate entities, √ a partnership is treated as a separate entity with its own estate that can be sequestered. √ **2**

Question 2.9.2

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

Once the provisional sequestration order is granted for Mr Solar the partnership will be wound up and the partnership assets will be divided amongst the partners. √ **1**

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

QUESTION 3 FOLLOWS ON NEXT PAGE / ...

PART 3 - LIQUIDATION (40 MARKS)

QUESTION 3

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

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

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

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

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

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

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

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

QUESTION 3.1

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

In the case of Supreme Court of Appeal in *Boschpoort Ondernemings (Pty)(Ltd) v ABSA Bank Ltd*, √ it was held that a solvent company is one that is commercially insolvent hence unable to pay its debts when due, as RNH was not able to settle debt they are commercially insolvent. √

Herewith the difference between factual and commercial insolvency:

- Factual insolvency is whereby the debtor, due to assets being exceeded by liabilities, is not able to settle debts as they are due. √
- Commercial insolvency, is whereby despite the assets exceeding liabilities, the debtor is unable to pay their debts as they are due. √ **4**

QUESTION 3.2

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

The Master √until a trustee has been appointed, then it will be under the trustee. √ **2**

QUESTION 3.3

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

Sequestration of the estate of RNH will suspend √the employment contracts with the various employers.

During this period of suspension the employees are not allowed to render services nor are they entitled to their salaries or wages. ✓

Besides unemployment benefits no other benefit accrues to the employees.

The trustee will have to consult with MAWU the registered trade union reaching consensus on appropriate measures to rescue the whole or part of the business or RNH. ✓ **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)**

Leases are not automatically terminated by the sequestration of the estate of the Lessee, herein RNH.

The liquidator may summarily cancel the lease agreement with RNH by giving them written notice, in which case Willow Family trust will have an unliquidated concurrent claim or damages for breach of contract. ✓

If the liquidator does not give notice to cancel the lease it will automatically cancel within a period of three months after the appointment of the liquidator, unless the liquidator notifies the Lessor within those three months that they intend to continue with the lease. ✓

Section 386(2) of the *Companies Act*, state the following: ✓

“ subject to the consent of the Master, a liquidator may, at any time before the general meeting is convened for the first time, terminate any lease in terms of which the company is the lessee of movable or immovable property” ✓

The Willow Family Trust will have a tacit hypothec over the movable property which RNH brought onto the property, this will serve as security for the Lessor's claim for rent in arrears which was due before the date of liquidation (subject to limitations in the Act). Rent after date of liquidation enjoys a preference as part of the sequestration cost.

The Willow Family Trust will therefore have a secured claim for arrear rental before liquidation. ✓ **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 359(1) of the Companies Act provides that on granting of the provisional order all civil proceedings will be suspended until the appointment of the liquidator. Should any person wish to continue with the civil proceedings they must give the final liquidator notice of the intention within 4 weeks after their appointment. **✓ 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 must include the following in his report to the creditors:

- The amount of capital issued by RNH and the estimated amount of its assets and liabilities ✓
- If RNH has failed the causes of the failure ✓
- Whether or not any director (Mr Ronald, Mr Naseer and Ms Hlope) 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 the Act. ✓
- Any legal proceedings by or against RNH which may have been pending at the date commencement of winding up or which may have been or may be instituted. ✓
- The progress and report of winding up, how he is proceeding with the winding up process. ✓
- Whether or not further enquiries in his opinion desirable in regard to any matter relating to the promotion, formation or failure of RNH 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)**

Mr Hue will have to advise MAWU regarding Section 98A(1)(a), ✓ where the employees were employed by RNH they are entitled but subject to the maximum amounts determined by the Minister of Justice by notice in the Government Gazette from time to time.

Mr Hue will set out the following in his explanation to MAWU:

- Any salary or wages for a period not exceeding three months, due to an employee (up to the maximum of R 12 000.00) ✓
- Any payment in respect of any period of leave or holiday due to the employee which accrued as a result of his employment in the year of insolvency or the previous year, (up to a maximum of R 4 000.00)

- Any payment due in respect of other form of paid absence for a period not exceeding three months prior to the date of liquidation (up to a maximum of R 4 000.00) ✓
- Any severance or retrenchment pay due to the employee in terms of any law, agreement or contract or wage-regulating (up to a R 4 000.00)

The employees salary claim will have preference above the other claims for leave and retrenchment. ✓ **5**

MAWU must also be notified that salary is only for cash earnings receivable and will not include other benefits not receivable as cash.

QUESTION 3.8

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

The three requirements as set out in the Security by Means of Movable Property are the following:

- The bond must be registered in terms of the Deeds Registries Act✓
- The bond must cover the corporeal movable property✓
- The property must be specified and described in a way that makes 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)**

SARS has a place in the list of statutory preferent creditors, it is a statutory obligation to pay these amounts out of the free residue

Section 114 of the Customs and Excise Act 1964, ✓ provides a special security right for SARS to secure payment of certain import taxes. The raw material can be detained and SARS will vest a lien✓ over the property until the debt is paid. ✓ SARS in relation to the raw material will be a secured creditor. ✓

It is important to notice that if SARS did not vest the lien before liquidation or the raw material detained do not cover the full claim, SARS will not be a concurrent creditor but will be paid as a statutory preferent creditor from the free residue. ✓ **4**

QUESTION 3.10

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

The board of directors will not succeed in placing the company in business rescue. ✓

Voluntary business rescue is instituted by way of passing a resolution by the board of directors of the company and filing the same with CIPC which RNH did on the 14th of February 2023. ✓

However, a resolution to this effect may not be adopted if liquidation proceedings have been initiated by or against the company, which was done by a creditor on the 11th of February 2023. ✓

The purpose of this restriction is to prevent board of directors of companies from side stepping bona fide liquidation applications by adopting these resolutions.

In *Tjeka Training Matters (Pty)(Ltd) v KPPM Construction (Pty)(Ltd)* it was held that liquidation proceedings are initiated once a liquidation is issued and served on the company. This was done before adoption of the resolution. ✓ **4 Pan African Shopfitters (Pty) Ltd v Edcon Limited and others. (1)**

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*** END OF ASSESSMENT ***

TOTAL MARKS: [100]