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## 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)**

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### EXAMINER

Ms B Bennett

### MODERATORS

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

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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.

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**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.
- (c) The insolvent may enter into an engagement contract after sequestration.
- (d) The insolvent may enter into a contract if it does not affect his estate negatively.

### Question 1.6

Select the **correct** statement:

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

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

#### Question 1.7

Select the **correct** statement:

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

#### Question 1.8

Select the **correct** statement:

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

- (a) *Stone & Stewart v Master of the Supreme Court*;

(b) *Mayo v De Monthlehu;*

(c) *Wishart v BHP Billiton Energy Coal South Africa Limited;*

(d) None of the above.

### Question 1.9

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

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

(a) True

(b) False ✓

### Question 1.10

Select the **correct** statement:

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

(a) Vests in the Master and thereafter in the trustee after his appointment as such. ✓

(b) Does not vest in the Master or the trustee of the insolvent.

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

(d) Only vests in the trustee when the High Court on application by a creditor of the estate grants an order for the vesting of the property.

### Question 1.11

Select the **correct** statement:

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

(a) The company itself.

(b) One or more of its creditors (including contingent or prospective creditors).

(c) A shareholder.

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

### Question 1.12

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

- (a) The primary purpose of a special meeting is to allow creditors to vote on important matters related to the insolvent estate. The trustee must convene a special meeting when requested by the insolvent, regardless of expenses.
- (b) Special meetings are convened for creditors to prove their claims, and the trustee must convene one if requested by an interested person who tenders payment of all expenses related to the meeting. ✓
- (c) The main objective of a special meeting is to finalise the distribution of assets to creditors and must be convened by the trustee after the second meeting.
- (d) A special meeting cannot be convened for the purpose of interrogating an insolvent as the primary purpose of a special meeting is to prove claims.

### Question 1.13

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

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

(a) True ✓

(b) False

### Question 1.14

Select the **correct** statement:

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

- (a) A proposal for a compromise in terms of section 155 is adopted by the creditors of the company, or a class of creditors, if it is supported by a majority in number representing at least 75% in value of the creditors or class present and voting in person or by proxy.
- (b) Section 155 does not apply where a company is under business rescue proceedings.



- (c) A liquidator where a company is being wound up may propose an arrangement or a compromise of the company's financial obligations.
- (d) Paragraphs (a) and (c) are correct.
- (e) Paragraphs (a), (b), (c) and (d) are correct. ✓

### Question 1.15

Select the **correct** statement:

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

- (a) The bondholder, as a secured creditor, can always insist on selling the property free from a lease, regardless of when the lease was entered into.
- (b) If the lease was entered into after the registration of a mortgage bond, the bondholder may insist on selling the property free from the lease, provided the sale subject to the lease did not realise enough to pay the bondholder's secured claim. ✓
- (c) The property must always be sold subject to the lease, regardless of when the lease was entered into.
- (d) If the property is sold without reference to a lease concluded after the registration of a mortgage bond, the sale is valid even if it did not realise enough to pay the mortgage bond in full.

### Question 1.16

Select the **correct** statement:

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

- (a) Whether the provision is capable of being applied in a winding-up.
- (b) Whether the matter is specifically provided for by the Companies Act.
- (c) Whether the provision applies to the type of winding-up.
- (d) Only paragraphs (a) and (c) are correct.
- (e) Paragraphs (a), (b) and (c) are correct. ✓

### Question 1.17

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

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

### Question 1.18

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

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

- (a) True ✓
- (b) False

### Question 1.19

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

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

### Question 1.20

Select the **correct** statement:

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

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

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

**QUESTION 2 FOLLOWS ON NEXT PAGE / ...**

## PART 2 - SEQUESTRATION (40 MARKS)

### QUESTION 2

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

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

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

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

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

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

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

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

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

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

### Question 2.1

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

[The *concursum creditorum* refers to the general body of creditors of the insolvent. ✓ The insolvency process is mainly driven by the creditors. The insolvency process is mainly there to see to and protect the creditors. The courts have highlighted the underlying purpose of the insolvency legislation - this is to secure the realisation of the remaining assets of the insolvent and the distribution thereof to the creditors. Creditors are then also ranked and the distribution must follow such ranking.

The relevant case law that explains this concept, is *Walker v Syfret*, ✓ and it specifically states that : "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. ✓" It goes further to indicate that no transactions may be entered into where one creditor acts to the detriment of the rest of the body of 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)

[We are dealing with voidable preferences here. This is when where a debtor has disposed of property in favour of a creditor, where such creditor will be preferred above other creditors, e.g. that such a creditor would then receive full payment prior to sequestration / liquidation of the debtor. It can also be that a creditors ranking is influenced, in that an unsecured creditor has now been placed in the position of a secured creditor. The relevant section in terms of the Insolvency Act is section 29(1) wherein a disposition by a debtor can be set aside as a voidable preference. It must have appeared that the debtor was unable to

pay all its creditors in full, but the debtor still went ahead and favoured the relevant creditor by paying the pre-existing debts in full. The trustee must prove the following in order to set aside a voidable disposition: The disposition should have been made within six months prior to the sequestration or death. That the effect of the disposition was to prefer one creditor above the others. That immediately after making the disposition the debtor's liabilities exceeded the value of his assets. The creditor can however counter this with the following defences: that the disposition was made in the ordinary course of business. That it was not intended to prefer one creditor above another. Section 30, √ Undue Preferences, can also be applicable, where the disposition of assets to a creditor made at any time before the sequestration and while the liabilities of the debtor exceeded his assets, with the intention of preferring one creditor above the rest.] √ **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)**

[ In terms of section 10 of the Insolvency Act - If the Court that received the petition for sequestration of the estate of a debtor is of the opinion that prima facie √ case has been made out through - (a) the petitioning creditor, √ has established against the debtor a claim in terms of subsection 9(1); and (b) the debtor has committed an act √ of insolvency √ or is insolvent ; and (c) there is reason to believe that it will be to the advantage of creditors to sequestrate the estate, then it/the court may make an order to provisionally sequestrate the estate of the debtor. √

9(1) indicates that only a creditor who has a liquidated claim of at least R100, or where two or more creditors apply jointly, where the total of their claims in aggregate is not less than R200, may bring such an application.

The court will usually place the estate under provisional sequestration and interested parties are entitled to object to the application on the return date to try to sway the court to not make the order final. ] **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)**

[Where an inheritance accrues before rehabilitation of the insolvent it will fall into the insolvent's estate. However, according to *Wessels NO v De Jager*, √ the inheritance will only vest in the trustee on acceptance by the insolvent heir of such inheritance. √ The inheritance of Mr Solar will therefore vest in the trustee of 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/her own benefit recover pension to which s/he may be entitled for services rendered. The pension benefits to which Mrs Solar became entitled to will therefore not form part of the joint insolvent estate.] **2**

#### **Question 2.5**

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

[Mrs Solar's vehicle was bought by Mr Solar through an ordinary credit sale agreement √ from Mr Green. There was also an agreement between the seller and purchaser that the ownership √ would pass on delivery, and despite this agreement, according to common law, ownership passes upon delivery in an ordinary credit transaction. √ If the parties were married in community of property, then yes, the vehicle would form part of the joint insolvent estate. Where they are married out of community of property then section 21 of the Insolvency Act is applicable. It provides that the additional effect of sequestration of the separate estate of one of two spouses shall be to vest in the Master, and upon appointment in the Trustee, all the property of the spouse whose estate has not been sequestrated as if it were property of the sequestrated estate. So, yes Mrs Solar's vehicle will form part of the insolvent estate. Mr Green will have an unsecured/concurrent claim against the estate for the remainder of the balance owing on the vehicle. ] **3**

#### **Question 2.6**

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

[The Master usually convenes the first meeting at a place in a district where the insolvent resides or where the insolvents place of business is. Subsequent meetings should also be

held at the same place. These creditor meetings are open and public. Before the meeting convenes a notice must go out to the registered creditors of the date and place of the meeting, as well as the detail of the debtor.] **1 Government Gazette**

### **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)**

[Sections 18(3) and 80bis are applicable in this instance. The trustee is only a provisional trustee prior to the second creditors meeting. Her powers / mandate has not yet been confirmed. The provisional trustee cannot sell property of the estate without the authority of the Master. The Master can any time before the second creditors meeting ✓ authorise the sale of assets in the estate on the conditions ✓ that she may determine, and in such a manner as she may direct. The two sections need to be read together. In terms of section 18(3) a Court may also be approached for the sale of property, but "such sale shall ... be after such notices and subject to such conditions as the Master may direct."

The authorisation provided by the Master ito section 80bis ✓ constitutes an administrative act, and may be unlawful in terms of the Promotion of Administrative Justice Act. However, the Master's authority remains valid and binding, until its set aside.] **permission of creditor**  
**3**

### **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 need to follow the laws and rules of that foreign country in order to be recognised as a trustee. ✓ So the trustee must first gain recognition by a court in that foreign country in order to exercise control over the immovable property. ✓ The immovable property remains vested in the insolvent if the Trustee cannot obtain this recognition. Mrs



Abel will therefore not be able to exercise control over the property in Italy if she does not obtain the necessary recognition.] ✓ **3**

### **Question 2.8.2**

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

[Yes, my answer will change. According to common law, movable property will vest in the insolvent estate if the insolvent was sequestrated by the court where he is domiciled. So with movable property in a foreign country, the trustee will be able to exercise control over the movable assets. ] **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)**

[section 13 of the insolvency Act is applicable. The insolvency Act treats the estates of the partnership and the partners as separate entities. ✓ A partnership is therefore sequestrated separately from the partners as a natural person. The estates of the partners are then also sequestrated as is normal for a natural person.] ✓ **2**

#### **Question 2.9.2**

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

[The partnership will then also have to be sequestrated.] **1**

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

**QUESTION 3 FOLLOWS ON NEXT PAGE / ...**

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**PART 3 - LIQUIDATION (40 MARKS)**

### **QUESTION 3**

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

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

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

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

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

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

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

Recognising the dire situation they are in, the Board decide to commence business rescue proceedings on 12 February 2023, and lodge the required documents with CIPC on 14 February 2023. The Board is not aware that an aggrieved creditor, who is owed a substantial sum of money for raw materials supplied, has already initiated a liquidation application

against the company which was filed and served by the Sheriff of the High Court on an employee of the company on 11 February 2023. The employee unfortunately placed the documents in his desk drawer and failed to bring the application to the attention of management.

### QUESTION 3.1

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

[Commercial insolvency is when the insolvent is unable to pay its debts. ✓  
Factual insolvency is when the insolvent's liabilities exceeds the value of its assets.  
In Boschpoort Ondernemings-case ✓ it was decided that a company is solvent when it is commercially solvent, i.e. when it can pay its debts when they become due. ✓  
In Murray NO and Others v African Global Holdings-case indicated that a company that was unable to pay its debts because banking facilities have been terminated and could therefore not access its liquid assets, was commercially insolvent. The company had to be wound-up and it was irrelevant that its assets might have exceeded its liabilities. ✓  
RNH is commercially insolvent for the following three reasons: cash shortfalls have hindered their ability to repay creditors and suppliers; they can't pay the customs and excise duty for the goods to be released; they require cashflow for monthly repayments of instalment sale agreements. They can therefore not pay their debts.] ✓ **5**

### QUESTION 3.2

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

[The provisional liquidator.]

**Custody and control of the assets of the company will be in the hands of the Master and then in the liquidator, once appointed. (1)**

### QUESTION 3.3

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

[Once liquidation commences the employment contracts are suspended. ✓ The employees do not have to tender their services any longer. The liquidator can however terminate these employment contracts in terms of section 38 of the insolvency Act. ✓ Where the employees keep on working, the liquidator need to make it very clear that its only on a monthly basis and that no employment is being guaranteed.] ✓ **3**

### QUESTION 3.4

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

[The liquidator has a discretion whether he wants to continue with the lease agreement or not/terminate it. ✓ This is set out in section 37 of the Insolvency Act. So yes the liquidator can continue with the lease or terminate it. ✓

The Willow Family Trust is the landlord in terms of the lease agreement. ✓ They therefore have a landlord's hypothec over the movables of the lessee or RNH. ✓ In terms of the definition for security in the Insolvency Act, ✓ they are then secured or preferent creditors. They would be able to keep the movables on the premises until the debt is paid.] ✓ **6**

### QUESTION 3.5

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

[In terms of section 359(1)(a) of the Companies Act, the instituting of a winding-up order will suspend all civil proceedings until the appointment of the liquidator. ✓ Once the liquidator is appointed the persons who would like to continue with the proceedings have four weeks within to give notice to proceed with the proceedings. They must give notice of three weeks, otherwise the proceedings will be deemed to be abandoned. All attachments / executions are void after liquidation.] **2**

### QUESTION 3.6

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

Section 402 indicates that a liquidator shall, as soon as practicable and, except with the consent of the Master, not later than three months after the date of his appointment, ✓ submit to a general meeting of creditors and contributories of the company concerned a report. The report should set out the following matters: (a) the amount of capital issued by the company and the estimated amount of its assets and liabilities; (b) i✓f 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) (i.e. a report containing full particulars of any such contraventions or offences, suspected contraventions or offences and any such ground which he has ascertained); (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 the 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; (g) whether or not the company has kept the accounting records required by section 284, ✓ and, if not, in what respects the requirements of that section have not been complied with; (h) the progress and prospects of the winding-up; and (i) any other matter which he may think fit.  
✓ 6

Specifically according to the fact sheet, the following matters are of importance to be included in the report by the liquidator on the company.

Regarding b), the failure of the company appears to be the energy constraints and the inability to use its equipment efficiently for production.

Regarding e), he should indicate all the civil proceedings and the judgement that were obtained against the company.

Regarding f), it also appears that a submission should be made on the failure of the business as indicated in the fact sheet.

### **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 employees will have a preferent right in terms of section 98A ✓ of the Insolvency Act to claim under the estate. There are certain maximum amounts indicated in the legislation that an employee can claim. It may also not be for more than three months' salary. ✓ There is also a cap on leave pay outs and severance pay in terms of the Act. The residue of the claims not covered under section 98A of the act, becomes concurrent or unsecured. Salary payments are capped at R12000 ✓ for a period not exceeding 3 months. Leave pay-outs are capped at R4000. ✓ Severance is also capped at R12000. The salary claims are preferent above any claims for leave and severance and any other claims relating to remuneration. Only employees and not independent contractors will qualify for these claims. An employee is someone who would normally receive salary or wages and in any manner assists and carry on in the conducting of the business. The employees will not need to prove their claims in this regard, they remain entitled to these payments. The liquidator might require an affidavit though in support of these payments. For the concurrent part of a claim - the employees would however need to submit a claim to the liquidator. Certain employees have been excluded from the preference, these are employees that have received some form of guarantee as protection , as well as the directors of a company and the members of a close corporation.] ✓ 5

### **QUESTION 3.8**

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

[The three requirements are: the bond must be registered in terms of the Deeds Registries Act. The moveable property must be corporeal i.e. tangible. And the moveable property must be described in the bond in a way that specifically identifies the asset and 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)**

[Section 114 of the Customs and Excise Act 1964 is applicable. In terms of this section SARS can keep the imported property on which the import tax is outstanding. In this manner SARS will then vest a lien over the property until the outstanding debt is paid. The Act specifically indicates that the detention of the property / raw material will take the form of "sealing, marking, locking, fastening or otherwise securing or impounding it on premises where it is found, or by removing it to a place of safety." SARS is then a secured creditor and then has a secured position over the property/raw material in the port of Durban.]

SARS is also a preferent creditor in terms of section 89, and will be paid from the free residue in this regard.] **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)**

[Firstly, the definition for "financially distressed" is of importance, to determine whether a company would qualify for business rescue proceedings or not. The definition indicates that a company at a particular time appears to be reasonably unlikely to be able to pay all debts as they become due and payable within the next six months. The definition also indicates that the company should appear to be reasonably likely to become insolvent within the next six months. The directors need to consider and apply this definition to the company and its affairs in order to determine whether business rescue or liquidation will be the better option. Kovacs Investments-case indicated that the directors need to give good reasons and facts and be clear on why business rescue is the best option. There should thus be reasonable prospects for of rescuing the company. The directors can via the

passing of a resolution put the company in business rescue. However, this resolution cannot be passed where a liquidation process has already been initiated by an interested person against the company . In this instance a liquidation process has been filed √ (11 Feb) prior to the business rescue documents filed with CIPC (14 Feb), and the liquidation process is first in time. From the test that needs to be applied as per the Kovacs-case and the dire financial situation that the company finds itself in, together with the fact that the company appears to be commercially insolvent, with the liquidation process already initiated – it appears very unlikely to impossible for a business rescue process to continue and/or be successful in this regard.] 1

In this instance the Board will not succeed in placing the company in business rescue as liquidation proceedings have already been initiated (1). - Section 129 of the Company Act 1973 deals with resolution to begin business rescue proceedings – resolution contemplated in subsection (1) – may not be adopted if liquidation proceedings have been initiated by or against the company (1) – initiated deemed to be the filing and service of the application papers on the company – the resolution will be a nullity. (1) Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and Pan African Shopfitters (Pty) Ltd v Edcon Limited and others. (1)

**35/40**

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

**TOTAL MARKS: [100]**