



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 75/100

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

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

QUESTION 2 FOLLOWS ON NEXT PAGE / ...

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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 is the general body of creditors of an insolvent's estate, which comes into existence on date of sequestration. From this date, the hand of the law is laid upon the insolvent's estate and the rights of the general body of creditors have to be taken into consideration. All the assets of the insolvent will be realised to the benefit of the concursum creditorum and distributed among creditors in terms of the Insolvency Act. No creditor can take any steps to prefer himself/herself/itself above another. The principle that no transaction after sequestration should prejudice the general body of creditor was explained in *Walker v Syfret*, 1911 AD 141, *Ward v Barrett NO and Another*, 1963(2)SA. .

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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)

The clock was given to Mr Hasty on 5 December 2022, merely one month before the sequestration application was issued. Mr Hasty was preferred, as his debt was extinguished in full, whilst other creditors now have to wait in line for a dividend on proven claims.

Ms Abel can have an action instituted against Mr Hasty in terms of Section 29 of the Insolvency Act, which entails that any disposition of property made by Mr Solar within a period of 6 months before the sequestration of his estate, which has the effect of preferring one of his creditors above another, may be set aside by the Court.

Ms Abel will have to prove that the liabilities of Mr Solar's estate exceeded the value of his assets immediately after the disposition. In light of the fact that the clock was delivered to Mr Hasty one month before the issuing of the sequestration application, Mr Solar was in all probability already insolvent (liabilities exceeding his assets) at the time of delivery of the clock.

A disposition in terms of the Insolvency Act has a wide meaning and it can mean transfer or abandonment of rights to property, sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract therefor. The delivery of the clock to Mr Hasty constitutes a disposition.

Mr Hasty will have to prove that the delivery of the clock was in the ordinary course of Mr Solar's business, which is not the case, and that it was intended to prefer one creditor above another. As the clock was delivered only one month before the sequestration application was issued, an inference can be drawn that Mr Solar wanted Mr Hasty to have the clock, in circumstances where he knew that other creditors will be disadvantaged by his actions.

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)

Axit Finance must make out a prima facie case to the court as follows:

1. that Axit Finance has a liquidated claim of at least R100,00 (one hundred Rand) against Mr Solar; and
2. Mr Solar is factually insolvent or has committed an act of insolvency; and
3. that there is a reasonable prospect that sequestration will be to the advantage of the creditors of Mr Solar's estate if he is sequestered.

From the set of facts, it appears that Axit Finance made out a case by meeting the above requirements and the court granted a provisional sequestration order. 5

Question 2.3

With regards to the inheritance that Mr Solar receives from his father after the sequestration order, explain whether the R500,000.00 inheritance will vest in the insolvent estate. In your answer refer to relevant case law.

(3)

The R500,000.00 inheritance will vest in the insolvent estate.

With reference to the principle of nudum praeceptum as set out in Vorster v Steyn, 1981(2) SA 831, where the will provided that should the beneficiary be insolvent at the time of death, the inheritance will go to a trust, the court held that such a provision was of no effect in law, the inheritance vested in the insolvent estate. See *Wessels v de Jager*

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)

As Mrs Solar received the pension pay out after date of sequestration, the pension pay out will not vest in the insolvent estate and Mrs Solar may keep the R600,000.00 in terms of Section 23(7) of the Insolvency Act. 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 sale of the car is a credit sale ✓in terms of the common law✓ and the the general rule is that the ownership of the vehicle transferred to Mrs Solar when the car was delivered to her by Mr Green. It was however also specifically agreed between the parties that ownership will pass on delivery of the vehicle to Mrs Solar. ✓

For this reason the vehicle cannot be reclaimed by Mr Green ✓

Mr Green would only have a concurrent claim against the Solar's' estate for the balance of the purchase price owing, being R40,000.00. ✓ 4

Question 2.6

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

The relevant Master of the High Court must convene the first meeting of creditors after receipt of the final sequestration order, by notice in the Government Gazette that a first meeting of creditors will be convened for creditors to proof their claims. **2**

Question 2.7

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

Section 80(bis) of the Insolvency Act find application here. ✓

Ms Abel will have to recommend to the Master in writing that the assets be sold immediately prior to the second meeting of creditors and the reasons therefor. ✓

Ms Abel will have to prepare an inventory of the assets, the estimated values and a motivation why the assets should be sold immediately.

Ms Abel will then have to obtain the Master's authorization for the sale and adhere to any condition they Master may have for the sale of the assets. ✓ **permission by 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:

No, the immovable property in Italy does not automatically vest in the insolvent estate of Mr Solar. ✓

Ms Abel will have first have the sequestration order and the **letter of executorship** apostilled at the High Court, and thereafter obtain a recognition order in Florence, Italy, in terms whereof the sequestration of Mr Solar and her appointment is recognised as well as confirmation of her right as trustee to sell the immovable property. ✓

If Ms Abel does not obtain recognition, the immovable property will remain vested in the insolvent. ✓ **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)

Movable property will immediately vest in the insolvent estate and the trustee will be able to have same delivered to her or sold or transferred (in the case of money/bitcoin/shares).

Common law ?

Question 2.9

Question 2.9.1

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

The Insolvency Act does not treat partnerships and partners as the common law does. Where the assets of the partnership are indistinguishable from the assets of the partners. In insolvency, the partnership is treated as a separate entity and the partners as separate entities. ✓

In circumstances where Mr Solar (a partner) is sequestrated, it does not mean that the partnership estate or the estate of the other partners will be sequestrated automatically. However, the partnership itself will terminate and be wound up. This means that the partnerships assets will be divided amongst the partners in terms of their partnership agreement. Any such assets due to the Mr Solar, will vest in his insolvent estate. ✓ 2

Question 2.9.2

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

As stated, the fact the Mr Solar's estate is sequestrated, doesn't automatically mean that the partnership estate or the individual estate of the remaining partners, are to be sequestrated. 1

The effect of the sequestration of Mr Solar on the partnership is that the partnership will be wound up - meaning the assets of the partnership are divided amongst the partners in terms of their partnership agreement or the common law. If any assets are due to Mr Solar in terms of this division, it will vest in his insolvent estate.

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

QUESTION 3 FOLLOWS ON NEXT PAGE / ...

PART 3 - LIQUIDATION (40 MARKS)

QUESTION 3

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

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

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

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

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

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

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

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

QUESTION 3.1

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

Commercial insolvency refers to a company's ability to pay its debts ✓when it becomes due and payable, i.e. unable to meet its day-to-day ✓ obligations in the ordinary course of business. The test for the ability of a company to pay its debt is contained in section 345 of the Companies Act. If a company is not able to pay (or secure) a debt within three weeks from date of demand, the company is deemed to be commercially insolvent. ✓

Factual insolvency is when the value of a company's liabilities exceed its assets (fairly valued), also referred to as balance sheet insolvency. ✓ **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 Master will have custody and control of the assets of RNH until the appointment of a provisional 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)**

Contracts of service of employees are suspended ✓with effect from date of granting of provisional order.

During the period of suspension of a contract of service:

- (a) an employee is not required to render services; ✓
- (b) an employee will not get any remuneration;

- (c) no employment benefits will be accrued;
- (d) is entitled to unemployment benefits.

Unless the liquidator and employee have agreed on a continuance of the employee's contract, all suspended contracts of service shall terminate 45 days after the date of appointment of the liquidator. ✓ **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)**

In terms of Section 37 of the Insolvency Act, the liquidator may terminate the lease agreement by giving written notice to The Willow Family Trust. ✓ If the liquidator does not give notice, the lease agreement will be deemed to be terminated after the said period of three months. ✓

The Willow Family Trust will have a claim against the estate for rental due from date of liquidation to date of termination (i.e. a maximum period of 3 months). This claim forms part of the costs of liquidation (preferred claim) ✓.

For any arrear rental owing, The Willow Family Trust will have concurrent claim ✓ in the insolvent estate. Unless it has perfected a hypothec ✓ over the movable assets on the leased property. In this instance, The Willow Family Trust will have a preferent claim in the insolvent estate in respect of any arrear rental owing. ✓

Should the liquidator terminate the lease agreement, the insolvent estate may forfeit its right to compensation for improvements made in terms of an agreement. **6**

QUESTION 3.5

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

In terms of Section 359(1) of the Companies Act, all civil proceedings will be suspended until appointment of a liquidator. **2**

Any attachment or execution put in force after commencement of winding-up is void.

Any person who intends continuing with legal proceedings against the liquidated company, must within four weeks after the appointment of the final liquidator give three

weeks' written notice of its intention to proceed. If no notice is given, it is presumed that the proceed were abandoned.

The liquidator should attend to substitution as debtor where civil matters were stayed.

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 should report on the following aspects with will be of importance to the creditors of RNH:

1. The asset and liability position of the company, in as far as Mr Hue could determine same. ;
2. The causes of failure, with specific reference to the losses recorded for the periods of 2021 and 2022, as recorded in the financial records of RNH. ✓ From what is set out above, the initial reason for the downfall of RNH is the electricity crisis in South Africa, which resulted in RNH not being able to fulfil their contractual obligations and losing of contracts. This apparently escalated into RNH not being able to pay its debt. Mr Hue should report on the details hereof;
3. Details of legal proceedings instituted against RNH as well as judgements taken. This will also be a confirmation of some of the liabilities of RNH; ✓
4. The accounting records of RNH and if same was kept properly; ✓
5. The progress in the winding up, i.e. how many claims have been received, what assets have been recovered and collection of outstanding debts of RNH; and ✓
6. Enquiry into the steps taken by the directors in circumstances where RNH was probably trading in insolvent circumstances when taking out a further loan and whether or not any director or officer appears to be personally liable for the damages or at least for the debt of the RNH with First Rand Bank. ✓ **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)**

- (a) The employee can claim for unpaid salaries ✓ for a period of three months, in a maximum amount of R12,000.00. ✓ The claim is statutory preferent in terms of Section 98A of the Insolvency Act. ✓
- (b) The employees will have a concurrent claim for any other claims for unpaid salaries (up and above the claim set out in (a).
- (c) Unpaid leave of employees to a maximum amount of R4,000.00 will be dealt with as concurrent claim in the insolvent estate. ✓

- (d) Any employee whose contract of service has been suspended or terminated is entitled to an unliquidated claim against the insolvent estate for compensation for loss suffered as a result of the suspension or termination. ✓ **5**
- (e) Any employee whose contract of service has been terminated in terms of section 38 read together with Section 98A of the Insolvency Act, will be entitled to claim from the insolvent estate for severance benefits.

QUESTION 3.8

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

The requirements are as follows:

- (a) the movable property covered by the special notarial bond is described in a manner which renders it readily recognisable; and ✓
- (b) the special notarial bond should be registered after the commencement of the Security by Means of Movable Property Act, 1993 (i.e. registered after 7 May 1993; and
- (c) the special notarial bond should be registered in accordance with the provisions of the Deeds Registry Act, 1937. ✓ **2**

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 is a creditor of the insolvent estate in respect of customs and excise tax.

SARS is in possession of property belonging to the insolvent estate, i.e. the raw material, and has a right of retention over the raw material until payment of the tax by the insolvent estate.

However, in terms of Section 47 of the Insolvency Act, if SARS deliver the raw material to the liquidator on his request, SARS will not lose the security it had over the raw material if SARS notifies the liquidator in writing of its rights and proves its claim in the estate, in due course.

SARS' claim will be dealt with as a preferent claim in terms of Section 101 of the Insolvency Act.

Section 114 of the Customs and Excise Act 1964 provides a special security right for SARS to secure the payment of certain import taxes (customs and excise duty) (1) – Is referred to as a lien but operates similar to a statutory pledge (1) – SARS will vest a lien over the property until the debt is paid (1) – such detention of property will cause SARS to become a secured creditor over the detained assets. (1)

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 meaning of Section 129(1) of the Companies Act, 2008, which provides that a board of a company 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.

Such a resolution may not be adopted if liquidation proceedings have been initiated against the company and the said resolution has no force and effect until it has been filed.

In *Mouton v Park 2000 Development 11 (Pty) Ltd and others* 2019 (6) SA, the court held that initiation of liquidation proceedings refer to a preceding causative act or conduct whereby the legal process in respect of business rescue was set in motion for example service of a liquidation application on the company.

What the initiation of liquidation is will depend of the facts and circumstances of each matter.√

In this instance, the service of a liquidation application on the company by a creditor, will be regarded as an initiated liquidation proceedings. Seeing that the resolution for voluntary business rescue was adopted and registered after the initiation of the liquidation proceedings, the resolution will have no force and effect and the directors will not succeed with the placing the company under business rescue by way of a resolution.√ Furthermore, I am not sure that there is a reasonable prospect of success of rescuing the company in light of the ongoing load shedding issues and increasing costs of electricity. **2**

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)

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*** END OF ASSESSMENT ***

TOTAL MARKS: [100]