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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 86**

## 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

**17/20**

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

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

## PART 2 - SEQUESTRATION (40 MARKS)

### QUESTION 2

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

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

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

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

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

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

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

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

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

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

### Question 2.1

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

In the *Walker v Syfret* 1911 AD141, √ the court explained the concept of *concursum creditorum* as follows:

- Sequestration / liquidation order crystallises the insolvent's position and the hand of the Law is laid upon the estate. √
- Once a sequestration order has been granted, the rights of the general body of creditors have to be taken into consideration.
- The general interest of the of creditors as a group ranks in priority over the interests of an individual creditor. √
- No transaction can thereafter be entered into regard to estate matters by a single creditor to the prejudice of the general body of creditors. √
- The claim of each creditor must be dealt with as it existed at the issue of the order of sequestration. 4

Mr Solar exchanged a valuable antique clock with Mr Hasty in full payment of debt(loan). This transaction prejudiced the remaining creditors as group in they will now receive a lower dividend.

### 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)

Section 29 of the Insolvency Act deals with Voidable Preferences.

Every disposition of his property made by a debtor not more than six months before sequestration of his estate, which has had a effect of preferring one of his creditors above another, may be set aside by the Court if immediately after making such disposition the liabilities of the debtor exceeded his assets, unless the person in whose favour the disposition was made in the ordinary course of business and it was not intended thereby to prefer one creditor above another.

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)

Section 46 of Insolvency Act states that if set-off of mutual debts has taken place and the estate of the insolvent party is sequestrated within six months, the trustee may either abide by or disregard such a set-off if it was not effected in the ordinary course of business, but with the approval of the Master.

05 December 2022, Mr Hasty was given a valuable antique clock by Mr Solar to settle a debt (a loan).

It appears in terms of Section 29 of the Insolvency Act, the exchange of the antique clock by Mr Solar to Mr Hasty as repayment of loan is a Voidable Preference, since the following elements are present;

- The disposition(exchange) occurred within 6 months prior to the sequestration of Mr Solar.
- Mr Hasty was preferred as he received full payment his loan by accepting the antique clock from Mr Solar.
- The delay in settlement of the loan to Mr Hasty and that clock (not monies) was used to repay the loan, indicates that Mr Solar's liabilities exceeded his assets.  
Mr Solar committed a "one of the act of insolvency", that he has disposed his property which had the effect of prejudicing his other creditors or preferring one creditor above another.
- The repayment of loan by the exchange of the antique clock is not in the ordinary course of business of Mr Solar, as he is a director of an accounting firm.

Ms Abel will now approach the Court and have this transaction set aside.

This transaction can also be argued under Section 46 of the Insolvency Act.

- The exchange of the antique clock as repayment of loan is a set-off transaction.
- The transaction occurred within six months of the sequestration of Mr Solar.
- This transaction is not in the ordinary course of business, as Mr Solar is a director of an accounting firm.

Ms Abel under Section 46 if the Insolvency Act, with the approval of the Master, can disregard the set-off and call upon Mr Hasty to return the antique clock to the estate. Mr Hasty will then be allowed to prove his claim to the estate, as if no set-off has taken place.

## 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, the applicant creditor, must in terms of section 10 of the Insolvency Act, prima facie prove that:

- The applicant creditor has a claim at least R100 or if there are two or more creditors apply jointly, where the total of their claims in total is not less than R200, may bring an application to court.
- The debtor is factually insolvent or has committed an act of insolvency, and
- There is reason to believe that sequestration would be an advantage to the creditors.

Axit Finance has met the specific requirements as follows:

1. They qualify as a creditor and that loan provided to Mr Solar is in excess of R100. The value if not stated in the facts above, however based on facts, the loan must be in excess of R100.
2. Mr Solar, the debtor, is factually insolvent or has committed an act of insolvency.

Mr Solar committed one of the act of insolvency, that he has disposed his property which had the effect of prejudicing his other creditors or preferring one creditor above another.

Mr Solar gave Mr Hasty his antique clock as settlement of the loan.

3. There is reason to believe that sequestration would be an advantage to the creditors. All creditors will be able to receive a dividend once the estate is finally wound up.

## 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)

If the right of inheritance accrues before the rehabilitation of the insolvent, the inheritance will fall into the insolvent estate.

However, it will only vest in the trustee on acceptance by the insolvent heir - Wessels NO v De Jager.

Mr Solar inherited R500,000 after the date of sequestration but before he was rehabilitated. He also accepted his right to receive the inheritance. Therefore the R500,000 will vest in his insolvent estate.

### Question 2.4

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

In terms of section 23(7) of the Insolvency Act, the insolvent may for his own benefit recover any pension to which he may be entitled for services rendered. ✓

The pension benefits to which Mrs Solar becomes 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 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 vehicle will vest in the insolvent estate as the ownership was passed to the Solar's on 05 August 2022. ✓

Mr Green entered into an ordinary credit sale agreement. This sale is referred to as a credit sale of movable property in terms of common law. ✓ Section 84 of the Insolvency Act does not apply, as this transaction is not an instalment agreement in terms of the National Credit Act.

In terms of the credit sale, ownership of the property passes to Mr/Mrs Solar upon delivery of the vehicle and therefore belongs to the insolvent estate. ✓

Mr Green merely has a concurrent claim for the outstanding purchase price due to himself. ✓ **4**

### Question 2.6

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

Section 40 of the Insolvency Act, states that



- (1) On receipt of an order of the court sequestrating an estate finally, the Master shall immediately convene by notice in the Gazette, a first meeting of the creditors of the estate for the proof of their claims against the estate and for the election of a trustee.
- (2) The Master shall publish such notice on a date not less than 10 days before the date upon which the meeting is to be held and such notice must state the time and place at which the meeting is to be held. **2**

### Question 2.7

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

Section 80bis of Insolvency Act √ - Sale of movable and immovable property on authorisation of Master

- (1) At any time before the second meeting of the creditors the trustee shall, √ if satisfied that any moveable or immovable property of the estate ought forthwith to be sold, recommend to the Master in writing accordingly, stating his reasons for such recommendation √
- (2) The Master may thereupon authorise the sale of such property, or any portion thereof, on such conditions and such manner as he may direct: Provided that, if the Master has notice that such property or portion thereof is subject to the right of preference, he shall not authorise the sale of such property or such portion, unless the person entitled to such right of preference has given his consent thereto in writing or the trustee has guaranteed that person against such loss by the sale. √

Ms Abel must in writing provide the Master reasons for the recommended sale of assets before the second meeting of the creditors. The Master once reviewed the recommendation and is satisfied that the sale is necessary, will authorise the sale subject to the asset in question that is being sold, if the asset is secured, the creditor has given his consent or that the trustee has guaranteed that creditor against any loss. **4**

### Question 2.8

#### Question 2.8.1

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

Answer:

In terms of the Insolvency Act, "property" of an insolvent estate includes Immovable property situated in the Republic of South Africa and Movable property situated in the Republic of South Africa. √

If a debtors estate includes immovable property over which the trustees wants to gain control and which is situated in a foreign country, the trustee cannot gain such control unless and until the trustee obtains recognition of the appointment as a trustee from the foreign court. If the trustee fails to obtain recognition, the immovable property remains vested in the insolvent. ✓

Mr Solar owns a property (holiday home) in Italy. Ms Able has to apply to an Italian Court to obtain recognition on her appointment as a trustee. After the Italian court has recognised her appointment, she will then be able to exercise control of the holiday home in Italy. ✓  
If no recognition is granted, Mr Solar will remain the owner of the property. ✓**4**

### **Question 2.8.2**

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

Yes, my answer will be different.

Movable property of the insolvent in a foreign country will, according to the common law, vest in the insolvent estate if the estate is sequestrated by the court where the insolvent is domiciled.

Ms Able will then include the movable property in Mr Solar's estate as he is domiciled in South Africa. She will have control of the movable assets that is in Italy. **2**

### **Question 2.9**

#### **Question 2.9.1**

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

The Insolvency Act, for most part, treats the estates of the partnership and its partners as separate entities. ✓

Accordingly, a partnership is treated as a separate entity with an estate which may be sequestrated as if it were a natural person. ✓ **2**

#### **Question 2.9.2**

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

The effect of the sequestration of one partner's estate is that the partnership itself will terminate, and such partnership will be wound up.

The insolvency of one of the partners of a partnership dissolves the partnership but does not cause the partnership estate to be sequestrated. **1**

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

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

## PART 3 - LIQUIDATION (40 MARKS)

### QUESTION 3

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

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

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

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

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

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

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

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

### QUESTION 3.1

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

Commercial insolvency is a position in which the company is in such a state of illiquidity that is unable to pay its debts even though its assets exceed its liabilities. Eg. The company is unable to pay its creditors and suppliers at month end, eg rent and stock purchases. Could include unable to pay its employees as well.

Factual insolvency is where the company's total liabilities exceed its total assets. Example - This is also known as balance sheet insolvency. When one reads the management accounts or annual financial statements of a company, the total liabilities exceed its total assets, thereby resulting in a negative equity. The company incurred substantial losses in the 2021 and 2022 financial years.

RNH

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.

The above indicates the RNH is unable to pay its creditors and suppliers which indicates that the company is **COMMERCIALY INSOLVENT 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 until a provisional liquidator is 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)**

The contract of employment contracts of all employees will be suspended ✓ in terms of Section 38 of The Insolvency Act.

The employees are no longer obliged to offer their services and are not entitled to remuneration or employee benefits in terms of the suspended contracts, but they are entitled to UIF(Unemployment Insurance Fund) ✓ - until the fate of the contracts of employment has been determined, that is terminated or transferred to a new owner/employer as provided in Section 38 of The Insolvency Act read with Labour Relations Act. ✓ **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 Willow Family Trust is the lessor. RNH(Lessee) rents the Industrial Property under a lease agreement. ✓

The lessor(The Willow Family Trust) obtains a tacit hypothec ✓ over the invecta et illata (movable property) which the lessee(RNH) brought onto the property. This hypothec serves to secure the lessors claim for the rent in arrears which was due before the date of liquidation. Rent that became due after liquidation enjoys a preference as part of the liquidation costs. ✓ The lessor tacit hypothec does not include movable property which, before such hypothec has vested, was mortgaged under a pre-registered special notarial bond and also does not include property for which an instalment sale contract in terms of The National Credit Act of 2005 applies. ✓

In terms of Section 85 of The Insolvency Act, limits the secured claim by virtue of the landlords legal hypothec to the following outstanding rental prior to and up to the date of liquidation.: ✓

- Three months, if the rent is payable monthly or shorter intervals than one month.
- Six months, if the rental is payable at intervals exceeding one month but not exceeding three months.
- Nine months, if the rental is payable at intervals exceeding three months but not exceeding six months, and

- 15 months in any other case. v **6**

### QUESTION 3.5

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

Section 359(1) of The Companies Act provides that the making of winding-up order suspends all civil proceedings until the appointment of a liquidator.

Section 359(1)(b) states that any attachment or execution put in force after the commencement of the winding-up is void.

**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)**

The liquidator report in terms of Section 402 of the Companies Act 1973 must include the following:

- the amount of capital issued by the company and the estimated amount of its assets and liabilities.
- if the company has failed, the causes of the failure;
- whether or not he has submitted or intends to submit to the Master a report under section 400 (2)
- whether or not any director or officer or former director or officer appears to be personally liable for damages or compensation to the company or for any debts or liabilities of the company as provided in this Act;
- 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;
- 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;
- 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;
- the progress and prospects of the winding-up; and
- any other matter which he may think fit or in regard to which he may desire the directions of the creditors or the contributories. **6**

The following issues can be discussed in the report:

- RNH incurred significant losses in 2021 and 2022, they are unable to pay its creditors and suppliers.
- RNH current position resulted the energy crisis in the country. Does have enough electricity to meet the demands of its customers. Unable to meet orders, resulted in termination of contracts.
- 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;
- 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;
- Are there any directors that are personally liable for damages.
- Any further enquiries that is required.
- The progress and prospects of the winding-up of RNH.

### **QUESTION 3.7**

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

In terms of Section 98A(1)(a) √ of The Insolvency Act, an employee who was employed by the insolvent is entitled, subject to the maximum amounts determined by the Minister of Justice by notice in the Government Gazette from time to time, to a preference for:

- (a) Any salary √ or wages for a period not exceeding three months, due to an employee up to maximum of R12,000. √
- (b) Any payment in respect of and any period of leave √ or holiday due to the employee which has accrued as a result of his employment by the insolvent in the year on insolvency or the previous year, whether or not payment is due at the date of liquidation, up to a maximum of R4,000. √
- (c) Any payment due in respect of any other form of paid absence for a period not exceeding three months prior to the date of liquidation of the estate up to maximum of R4,000.
- (d) Any severance or retrenchment pay due to the employee in terms of any law, agreement, contract, or wage regulating measure, up to a maximum of R12,000. The Insolvency Amendment Act 2002 expanded the preference to include severance or retrenchment pay as result of termination of contracts of service in terms of Section 38 of The Insolvency Act.



The salary preference has preference above others.

The claims in paragraph (a) above have preference above the claims in paragraphs (b) to (d), which rank equally and abate in equal proportions if necessary. **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 3 requirements as The Security by Means of Movable Property Act, are as follows:

1. The bond must be registered in terms of the Deeds Registries Act. ✓
2. The movable property must be corporeal(tangible) ✓
3. The movable property must be specified and described in the bond in a manner that renders it readily recognisable. ✓ **3**

### QUESTION 3.9

With regards to the raw material that is located at the Durban harbour, discuss the position of SARS in the hierarchy of creditors when enforcing a customs and excise lien over the assets under their control. **(4)**

RNH has a shipment of raw materials as the Durban harbour, but they need funds to pay customs and excise duty before it can be released.

Section 114 of the Customs and Excise Act ✓ provides a special security right for SARS to secure payment for certain import taxes (customs and excise duties). The security right is referred to as a lien in the Act and operates similar to a statutory pledge. In terms of Section 114, SARS can detain the goods/property, in terms of the lien, until the customs and excise duties(the debt) have been paid. ✓

SARS will then be a secured creditor with reference to the detained property(goods). However, if the detained property is not sufficient to settle its entire claim, SARS will be a preferred creditor under Section 99 of the Insolvency Act. ✓

It must be noted that SARS lien cannot vest ✓ over the property/goods not belonging to the customs debtor.

SARS has a place in the list of statutory preferent creditors and will be paid from the free residue of the estate. ✓ **4**

If SARS did not vest a lien before liquidation or the assets detained do not cover the full claim, SARS will **not** be a concurrent creditor but will be paid as statutory preferent creditor from the free residue.

### QUESTION 3.10

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

Business rescue is defined as – proceedings to facilitate the rehabilitation of a company that is financially distressed.

Financially distressed in reference to a particular company at any particular place, means that –

1. It appears to be reasonably unlikely that the company will be able pay all of its debts as they become due and payable within the immediately ensuing six months; or
2. It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.

There are two routes into business rescue, first voluntary commencement (a company resolution) and the second is formal court application by an affected person (compulsory commencement).

In terms of the above, the board of directors of RHN and complied with the requirements of placing a company into business rescue.

- RHN is financially distressed, as it is unable to repay creditors and suppliers when the debts become due. It is unlikely that the company will be able to pay its debts as they become due immediately within six months.
- The Board decides to commence business rescue proceedings on 12 February 2023, and lodge the required documents with CIPC on 14 February 2023. This is a voluntary commencement of business rescue. The Board took company resolution.

It must be noted that at time of the above decision the board was unaware of 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.

This application for liquidation was lodged before the board's resolution to place the company into business rescue.

**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]