



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 70/100

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 ****

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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)

[Type your answer here]

Concursum creditorum is a fundamental principle in South African insolvency law. This common law principle emphasizes that the collective rights of creditors are to take precedence over the rights of an individual creditor upon the granting of an order of sequestration. This means that a single creditor cannot independently pursue complete payment of their claim through execution at the expense of the other creditors, and post-sequestration, creditors cannot seize assets acquired by the debtor.

The seminal case in which the principle of *concursum creditorum* was discussed is **Walker v Syfret 1911 AD 141**, where the court stated at p.166: √

"The object of the [Insolvency Act] is to ensure a due distribution of assets to creditors in the order of their preference... The sequestration order crystallises the insolvent's position; the hand of the law is laid upon the estate, √ and at once the rights of the general body of creditors have to be taken into consideration. No transaction can thereafter be entered into with regard to estate matters by a single creditor to the prejudice of the general body. The claim of each creditor must be dealt with as it existed at the issue of the order." √ 4

In the case of Mr. Solar, the sequestration order has the following impacts on both his estate and his creditors:

1. FCM Vehicle Finance Ltd, Mr. Green, and Axit Finance collectively constitute the general body of creditors in Mr. Solar's sequestered estate.
2. The rights of this general body of creditors, mentioned above, must be duly acknowledged.
3. Transactions related to estate matters cannot be initiated by a single creditor, as mentioned in point 1, to the detriment of the other creditors.
4. Each creditor and their respective claim(s) must be addressed based on their status at the time of the sequestration order.

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)

[Type your answer here]

The following relevant facts can be extrapolated regarding the antique clock which Mr Solar delivered to Mr Hasty in full and final settlement of his debt:

- 5 December 2022, after being pressured by Mr Hasty, Mr Solar delivered one of his valuable antique clocks as full and final payment of the loan that he had obtained from Mr. Hasty.
- Mr Solar's estate was provisionally sequestrated on 15 January 2023.
- On 20 February 2023, the sequestration order was made final regarding Mr. Solar's estate.

Taking the above facts into consideration, did Mr. Solar commit a disposition that favoured Mr. Hasty at the expense of his 3 remaining creditors? To answer this question, the relevant provisions of section 29 of the Insolvency Act 24 of 1936 (the "Insolvency Act"/the "Act") are briefly stated below.

The provisions of section 29(1) of the Insolvency Act (Voidable Preferences) state as follows:

1. The disposition of a debtor's property within six months before sequestration, (or before death in case of a deceased insolvent) which favours one creditor over another, may be set aside by the Court.
2. The Court may set aside the disposition if, immediately after said disposition, the debtor's liabilities exceeded the value of the assets in their estate.
3. An exception can be made to the above, only in the instance that such disposition(s) was/were done in the ordinary course of business, and as such were not intended to prefer one creditor over another, if such can be proven.

Therefore, regarding Mr. Solar delivering the antique clock to Mr. Hasty, Ms. Abel will have to prove the following in order to have the court set the disposition aside:

1. Mr. Solar delivering his valuable antique clock, on 5 December 2022, as full and final payment of the loan that he had obtained from Mr. Hasty, falls within the 6 month period stipulated in section 29(1) of the Act.
2. Mr. Solar, just over a month after delivering the clock to Mr. Hasty, became insolvent as his liabilities exceeded the value of the assets in his estate somewhat immediately after said disposition, hence the granting of the order of provisional sequestration on 15 January 2023.
3. The disposition was not done in the ordinary course of business as it was done to settle a personal debt owed to Mr. Hasty in full and given the fact that Mr. Solar had 3 other creditors at the time (FCM Vehicle Finance Ltd, Mr. Green, and Axit Finance), it created a preference that favoured Mr. Hasty at the remaining creditor's expense.

Provided Ms. Abel can prove the above, based on a preponderance of probabilities, she will be successful in her application to set the disposition aside (see: **Nicholls & Whitelaw v Akoo 1948 (4) SA 197 (N)**).

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)

[Type your answer here]

Section 10 of the Insolvency Act (Provisional Sequestration) places the following requirements regarding an application for provisional sequestration:

1. The Court may order provisional sequestration of a debtor's estate if:
 - The petitioning creditor has a claim under subsection (1) of section nine of the Act.√The debtor has committed an act√of insolvency or is insolvent.√There is reason to believe that sequestration is advantageous to the debtor's creditors.√

Taking the facts of this matter into consideration, Mr. Solar delivering his valuable antique clock, as full and final payment of the loan that he had obtained from Mr. Hasty constituted an act of insolvency, as contemplated in section 8(c) of the Act as it had the effect of prejudicing Axit Finance and his other creditors by way of preferring one creditor (Mr. Hasty) above the others (FCM Vehicle Finance Ltd, Mr. Green and Axit Finance).

Therefore, Axit Finance's application for a provisional order of sequestration will be in terms of section 10(b) of the Act read with section 9 of said Insolvency Act. **4**

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)

[Type your answer here]

With regards to the inheritance that Mr Solar received from his father after the sequestration order, it is important to note that Mr. Solar had accepted said inheritance on on 1 May 2023, two months after the final order of sequestration was granted and prior to his rehabilitation.√

As a result of said acceptance, the question that arises is what effect does Mr. Solar's acceptance of said inheritance create in relation to the R500,000?

If one examines the authority laid in **Wessels NO v De Jager NNO 2000 (4) SA 924 (SCA)**, the court held that a right to inheritance shall only arise upon the acceptance of said inheritance, by the heir in question. As such, no right to the inheritance of the asset(s) in question can vest in the trustee until the heir accepts said inheritance.

Therefore, when the above principle is applied to Mr. Solar's acceptance of the inheritance, said inheritance vested in the trustee on 1 May 2023 and as such, forms part of Mr. Solar's estate and can be realised to the benefit of his creditors. This is furthermore supported by the provisions of section 20(2)(b) of the Insolvency Act, which makes provision for property which the insolvent may acquire or which may accrue to him during the sequestration.

3

Question 2.4

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

[Type your answer here]

Assuming but not conceding that Mrs. Solar received her pension payout on or after 1 May 2023, this would thus mean that said payout was received after their joint estate was finally sequestrated on 20 February 2023.

Therefore, in light of the above, section 37B of the Pension Funds Act 1965 excludes said pension payout from forming part of the assets of their estate and as such will not vest in the joint insolvent estate. 1 S 23

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)

[Type your answer here]

Taking into account the wording of the facts as they relate to Mr. Green's claim in respect of the 2016 Hyundai i20, this gives rise to two possible positions in relation to the pursuit of his claim.

In the first instance, assuming, but not conceding that the vehicle was registered in Mr. Solar's name, based on the fact that he concluded a credit sale agreement on 5 August 2022, coupled with his payment of a deposit of R20,000 the asset would form part of his estate by virtue of his ownership in respect thereof. ✓

In the second instance, that despite Mr. Solar concluding the credit sale agreement and making payments in respect thereof, and subsequently donated the vehicle to Mrs. Solar and it was registered in her name, this evokes the provisions of section 21(2)(b) of the Insolvency Act of due to said vehicle being acquired by Mrs. Solar during her marriage with Mr. Solar, by way of a title valid as against his creditors being the vehicle registration papers naming her as the owner of the vehicle.

The effect that this would have on the asset in question is that:

1. The Master would hold all property until a trustee is appointed; and
2. Upon trustee appointment, property vests in the trustee as if part of the sequestrated estate.

2

Although the last instalment is still to be paid and by agreement ownership passed on delivery (1) – Mr Green lost ownership in the vehicle since it is a credit sale in terms of the common law (1) – in terms of a credit sale, ownership of the property passes to the purchaser on delivery and the vehicle therefore belongs to Mr Solar's insolvent estate (1) – Mr Green merely has a concurrent claim for the outstanding purchase price owing to him. (1)

Question 2.6

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

[Type your answer here]

In terms of section 40 (1) of the Insolvency Act, the Master convenes a first meeting of creditors upon receipt of a court order sequestrating an estate.

In terms of section 40(2) of the Act, notice of the first meeting is done by way of publication of said notice in the Government Gazette, at least ten days before the meeting, specifying time and place where said meeting shall 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)**

[Type your answer here]

In order for Ms. Abel to urgently sell the movable assets of the insolvent estate, she will have to comply with the provisions of section 80bis of the Insolvency Act.

This would require Ms. Abel to do the following in terms of said section:

1. Prior to the second meeting of creditors, Ms. Abel would have to assess if immediate sale of estate property is necessary (section 80bis(1)).
2. If so, she must provide a written recommendation to the Master, clearly stating the reasons for proposing the sale (section 80bis(1)).

This is due to the fact that the Master holds the authority to grant approval for the sale of the specified movable property or a portion thereof in terms of said section. ✓

If the Master is aware that the movable property is subject to a right of preference, Ms Abel would:

1. Require written consent from the creditor entitled to the right of preference (section 80bis(2)). ✓
2. Alternatively, guarantee the protection against any loss resulting from the sale to the creditor possessing the right of preference (section 80bis(2)). ✓
3. In the event that the property belongs to a company, Ms. Abel must comply with the provisions of the Companies Act 61 of 1973, specifically sections 386(2A) and (2B) of said Act. ✓

By following these steps, this would ensure that Ms. Abel is in compliance with Section 80bis when selling the movable property under urgent circumstances. **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:

[Type your answer here]

In terms of section 20(1) of the Insolvency Act, property belonging to the insolvent estate is vested in the Master until a trustee has been appointed, and, upon the appointment of a trustee, to vest the estate in said person, being Ms. Abel in this case.

When this section is applied to the facts as they relate to Mr. Solar's immovable property, located in Italy, the principle of **territoriality reciprocally** applies, in that the Italian courts would not be obliged to recognise the legitimacy of foreign insolvency proceedings and further asserts the sovereignty of Italian domestic law, where said immovable property is located. ✓

This is due to the fact that the powers of the South African Court wherein the order of sequestration was granted do not extend beyond the boundaries of, or over subjects or subject-matter, not associated with, the Court's ordained territory (see: **MacDonald & Co Ltd v M & M Products Co 1 991 (I) SA 252 (A) at 256G**).

Therefore Mr. Solar's immovable property, located in Italy, does not automatically vest in his insolvent estate and as such, √Ms. Abel cannot exercise control over said immovable property as the court order granting her such powers, in terms of the Insolvency Act, is a South African Court, doing so within the provisions of South African legislation (the Insolvency Act 24 of 1936) of which said court's jurisdiction is limited in that regard.

If Ms. Abel intends to assume control of the immovable property located in Italy, she must adhere to the legal procedures of the relevant Italian court. This involves satisfying the criteria specified in Italy's laws and procedures to gain recognition as a trustee for the mentioned property. √

This process may necessitate Ms. Abel to submit a request from the South African court to the relevant Italian court, seeking acknowledgment as a trustee or liquidator. √

Additionally, Ms. Abel might have to seek an order from a South African court, known as a 'process-in-aid' or letters of request, compelling the pertinent Italian court to assist her in her capacity as the South African trustee/representative (See: **Ex parte Wessels and Venter NNO: In re Byke-Nott's Insolvent Estate 1996 (2) SA 677 (O)**) **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)

[Type your answer here]

Yes. √This is due to the distinction that is drawn between movable and immovable property located in foreign jurisdictions in terms of the UNCITRAL guide at para 25.

If the sequestration order is granted by the court of the debtor's domicile, √which in this case is South Africa where Mr. Solar is domiciled, that order vests the his movables in the trustee, regardless of where they are located. (See: **Ex parte Palmer NO: In re Hahn 1993 (3) SA 359 (C) at 362B-E**; and **Lagoon Beach Hotel (Pty) Ltd v Lehane NO 2016 (3) SA 143 (SCA)** at para 27.)

In the case of **Ex parte Palmer NO: In re Hahn 1993 (3) SA 359 (C) at 362E**, it was held that if a foreign trustee makes an application for recognition in a foreign jurisdiction (in this case, Italy) "...such an application is invariably made and the need for formal recognition has been elevated into a principle."

Therefore, if Ms Abel sought a recognition order for the purposes of acquiring control over Mr. Solar's movable assets in Italy, such an order would be declaratory, regarding her entitlement to the movable asset in question and as such, would be subject to the local requirements established in Italian law, so as to adequately administer said assets as though they were South African Insolvency law, from which she derives her authority from. (See: **O'Brien "Transnational Aspects in South African Insolvency Law' in Conference on Reform of South African Insolvency Law Rand Afrikaans University (1995) 1** at 14). **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)

[Type your answer here]

The common law position holds that a partnership is devoid of a distinct legal existence separate from its individual partners, rendering the assets of the partnership indistinguishable from those belonging to the partners individually. ✓

The debts of partnership debts are regarded as being in *solidum*, establishing joint and several liability for all partners. ✓

As such, a creditor of a partnership retains the right to pursue legal action against the partners, either collectively or sequentially, for the satisfaction of a partnership debt.

Therefore, in terms of section 13 of the Insolvency Act, Mr. Solar and his partners will be treated as follows when a provisional sequestration order is granted:

1. The sequestration of Sum-It-Up Accounting's estate would result in the simultaneous sequestration of each partner's estate, except for:
 - Partners *en commandite*.
 - Special partners under specific acts (Special Partnerships' Limited Liability Act, 1861)
 - Special partners defined in Law 1 of 1865 of Natal, who have not held themselves out as ordinary or general partners.

Furthermore, in the event that Mr. Solar undertakes to commit to paying the partnership debts within a court determined period and provides satisfactory security, section 13(1) provides that the other partners separate estates will not be sequestrated solely due to the partnership's sequestration.

2

Question 2.9.2

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

[Type your answer here]

Mr. Solar's insolvency will result in the dissolving of the partnership but this will not cause the the partnership estate of Sum-It-Up Accounting to be subsequently sequestrated. ✓ (See: Cf De Wet and Yeats, *Kontraktereg en Handelsreg*, 4th ed, at 527.)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)

[Type your answer here]

Factual insolvency, refers to an instance where a company's liabilities exceed its assets to the extent that it √even if it was to sell its assets to meet its creditor's demands, it still would not be able to satisfy its debts. (See: **Boschpoort Ondernemings (Pty) Ltd v Absa Bank Ltd (936/12) [2013] ZASCA 173** at para 8.) √

An example of such a situation would be where a company has neither sufficient cash at hand and realisable assets that can be liquidated to satisfy any claims against it. √

With regard to commercial insolvency, the case of **Johnson v Hirotec (Pty) Ltd 2000 (4) SA (SCA)** at para 6, defines such insolvency as an instance where a company is unable to pay its debts when they are due, despite its assets exceeding its liabilities. √

An example of this would be an instance where the company does not have enough cash at hand, or its cashflow is restricted to the extent that it is unable to procure input resources to manufacture its product(s) despite its movable and immovable assets exceeding its liabilities in relation to said costs.

In terms of the facts at hand, as they apply to RNH, the company is commercially insolvent as it urgently requires cash to acquire raw material to meet consumer demand, coupled with the outstanding payment of the customs and excise duty before for the raw materials required to meet said demand.

The fact that Rand First Bank approved their application for a loan to obtain cash to acquire the raw materials required to meet consumer demand, was granted subject to them registering a general notarial bond over certain of their movable assets as security for said loan, means that RNH has enough assets to satisfy said debt in the event that those movable assets have to be liquidated to pay the bank back in the event of their default. √ **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)

[Type your answer here]

In terms of section 21(1)(a) of the Insolvency Act, custody and control of RNH's assets will be vested in the Master until a trustee has been appointed and once said appointment has been made, custody and control shall be subsequently vested to the appointed trustee. 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)

[Type your answer here]

Section 38 of the Insolvency Act will impose the following 3 effects on the employment contracts of RNH employees from the date of the granting of the sequestration order:

1. **Suspension of Contracts:** ✓

Contracts of service for employees of RNH are suspended from the date of the sequestration order (section 38(1✓)).

2. **Period of Suspension:**

During the suspension period:

- Employees with suspended contracts are not obliged to provide services or receive remuneration (section 38(2)(a)). ✓
- No employment benefits accrue to employees with suspended contracts (section 38(2)(b)).

3. **Unemployment Benefits:**

Employees with suspended contracts will be entitled to unemployment benefits under the Unemployment Insurance Act, 1966 (Act 30 of 1966) from the date of suspension, following the provisions of that Act (section 38(3)). 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)

[Type your answer here] Section 386(2) of the Companies Act 1973 deals with the effect of liquidation on a lease agreement (1) - the liquidator may, subject to the consent of the Master, at any time before a general meeting is convened for the first time, terminate any

lease in terms of which the company is the lessee of immovable property (1) - if the liquidator does not terminate the contract the lease will, in any event, automatically be terminated three months after the appointment of the liquidator, (1) unless he notifies the lessor within those three months that he intends to continue with the contract - (1) in terms of the common law, the lessor of immovable property has a security right called a tacit hypothec, (1) over movables brought onto the leased property and over fruit and crops yielded by the property as security for the payment of arrear rental. (1)

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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)

[Type your answer here]

Section 21 of the Insolvency Act aims to collectively regulate legal actions against the insolvent entity throughout the liquidation process.

As such, the following overall effects shall apply to RNH, by virtue of the provisions of said section:

1. **Effect on Civil Proceedings (Section 21(1)(b)):** Upon the sequestration of RNH's insolvent's estate, civil proceedings involving RNH will generally be stayed until a trustee is appointed. 2
2. **Exception for Certain Proceedings (Section 21(1)(b)):** Notwithstanding the general stay, proceedings allowed by Section 23, initiated either by RNH for its benefit, or against RNH may proceed.
3. **Claimant's Right for Costs (Section 21(1)(b)):** If a claim, subject to legal proceedings stayed by sequestration, has been proved and admitted against RNH's insolvent's estate (Section 44 or 78 of the Insolvency Act), the claimant may prove a claim for taxed costs incurred in connection with those proceedings.
4. **Stay of Execution (Section 21(1)(c)):** Once the sheriff or messenger, responsible for executing a judgment against RNH becomes aware of the sequestration, execution is stayed, unless directed otherwise by the court.

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)

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[Type your answer here]

The amount of capital issued by the company and the estimated amount of its assets and liabilities (1) – the causes of the failure of the company, if the company failed (1) – whether or not a report under section 400(2) will be submitted to the Master (1) – the personal liability of any director or officer or former director – legal proceedings against the company, if any, at date of commencement of winding-up or which may have been or may be instituted (1) – whether or not further enquiry desirable in regard to any matter relating to the promotion, formation or failure of the company or conduct of its business (1) – accounting records required by section 284 (1) – progress and prospects of the winding-up (1) – any other matter the liquidator may think fit or in regard to which he may desire the directions of the creditors or the contributories. (1)

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)

[Type your answer here]

Section 98A of the Insolvency Act deals with the salaries and wages due to former employees of the insolvent.

According to said section, in the event of the RNH's liquidation, MAWU members who were employees of the insolvent company are entitled to the following:

1. **Salary or Wages (Section 98A(1)(a)(i)):** √Employees are entitled to receive any salary or wages due to them for a period not exceeding three months. √
2. **Leave and Holiday Payments (Section 98A(1)(a)(ii)):** Payments for accrued leave or holiday in the year of insolvency or the previous year, even if not yet due at the date of liquidation. √
3. **Paid Absence (Section 98A(1)(a)(iii)):** Payments due for any other form of paid absence for a period not exceeding three months before the liquidation date. √
4. **Severance or Retrenchment Pay (Section 98A(1)(a)(iv)):** Any severance or retrenchment pay due to the employee as per relevant laws, agreements, contracts, or wage-regulating measures. √
5. **Contributions (Section 98A(1)(b)):** Any contributions owed by RNH, including those for pension, provident, medical aid, sick pay, holiday, unemployment, or training schemes, or similar funds.

RNH employees are entitled to these payments regardless of whether they have proved their claims under Section 44 of the Insolvency Act or not.

The employees should be aware that the trustee may request an affidavit to support their claims and said claims are prioritized, with salary or wages taking precedence, followed by paid absence, leave, and other payments, and then contributions. **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)**

[Type your answer here]

In terms of section 1(1) of the Security by Means of Movable Property Act 57 of 1993, the following three basic requirements must be met in order for a right of preference to be granted to a secured creditor:

1. **Corporeal Nature Requirement (Section 1):** The movable property pledged as security must possess a tangible, corporeal nature. ✓
2. **Specification and Description Requirement:** The bond must articulate a clear and distinctive specification of the movable property, ensuring it is described in a manner that readily identifies and distinguishes it. ✓
3. **Registration Requirement:** The bond must be registered according to the provisions set forth in the Deeds Registries Act 47 of 1937. ✓ **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)**

[Type your answer here]

Section 114 of the Customs Act 91 of 1964 (the "Customs and Excise Act") establishes that any duty, interest, penalty, or forfeiture incurred under said Act and payable to the State constitutes a debt. When such amounts become due or payable, they are considered debts owed to the State and are recoverable by the Commissioner in the manner specified in section 114 of said Act.

Regarding the position of the South African Revenue Service (SARS) in the hierarchy of creditors, when enforcing a customs and excise lien over assets under their control, the Customs and Excise Act grants SARS the following status and powers in relation to said lien:

1. **Priority Status (Section 114):** Customs and excise debts specified in Section 114 generally hold a significant position in the hierarchy of creditors. Section 114 establishes that any duty, interest, penalty, or forfeiture incurred under the Act and payable to the State constitutes a debt. ✓
2. **Legal Authority (Section 114(1)(a)(ii)):** The Customs and Excise Act empowers the Commissioner to take specific actions for recovery. Section 114(1)(a)(ii) of said Act allows the Commissioner, if any person fails to pay the amounts due, to file with the clerk or registrar of any competent court a statement certified by him as correct. This statement has the effects of a civil judgment. ✓
3. **Enforcement Mechanism (Section 114(1)(a)(ii)):** SARS, through the Commissioner, has the authority to take legal actions comparable to a civil judgment, providing a strong legal basis for the enforcement of customs and excise debts. Section 114(1)(a)(ii) specifies the filing of a statement with the court for enforcement purposes. ✓

In summary, when enforcing a customs and excise lien over assets, SARS holds a significant and legally empowered position in the hierarchy, with the ability to take specific actions for the recovery of such debts and recover said duties from the liquidation of the raw materials or free residue in RNH's insolvent estate.

✓4

QUESTION 3.10

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

[Type your answer here]

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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]