****

**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D**

**SOUTH AFRICA**

This is the **summative (formal) assessment** for **Module 7D** of this course and must be submitted by all candidates who **selected this module as one of their elective modules**.

**The mark awarded for this assessment will determine your final mark for Module 7D**. In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

**INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.

2. All assessments must be submitted electronically in **Microsoft Word format**, using a standard A4 size page and an 11-point 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. However, 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).

4. You must save this document using the following format: **[studentnumber.assessment7D]**. An example would be something along the following lines: 202021IFU-314.assessment7D. **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 “studentnumber” 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. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words**.

6.The final submission date for this assessment is **31 July 2021**. The assessment submission portal will close at **23:00 (11 pm) GMT on 31 July 2021**. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.

7. Prior to being populated with your answers, this assessment consists of **8 pages**.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1 (multiple-choice questions) [10 marks in total]**

Questions 1.1. – 1.10. 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.

**Question 1.1**

Choose the **correct statement**:

1. A creditor in whose favour a mortgage bond over immovable property has been registered, may not dispose of the immovable property upon the sequestration of the debtor’s estate.
2. A creditor in whose favour a general notarial bond over immovable property has been registered, may not dispose of the immovable property upon the sequestration of the debtor’s estate.
3. A creditor in whose favour a special notarial bond over immovable property has been registered, may not dispose of the immovable property upon the sequestration of the debtor’s estate.
4. A creditor in whose favour a mortgage bond over movable property has been registered, may not dispose of the immovable property upon the sequestration of the debtor’s estate.

**Question 1.2**

Choose the **correct statement** in relation to impeachable dispositions and the powers of the business rescue practitioner to have dispositions sets aside –

1. A disposition not for value made by the company prior to being placed under business rescue may be set aside in terms of the provisions of section 26 of the Insolvency Act 24 of 1936.
2. A disposition preferring one creditor above another made by the company prior to being placed under business may be set aside in terms of the provisions of section 29 of the Insolvency Act 24 of 1936.
3. A disposition with the intention to prefer one creditor above another made by the company prior to being placed under business may be set aside in terms of section 30 of the Insolvency Act 24 of 1936.
4. None of the above are correct.

**Question 1.3**

A liquidator of a company may exercise the following power **without** the consent of the Master of the High Court:

1. Terminating a lease agreement prior to the general meeting.
2. Instituting legal proceedings.
3. Selling any movable property of the company prior to the general meeting.
4. Selling any immovable property of the company prior to the general meeting.

**Question 1.4**

Read the following statements in (i) to (iv) below.

1. In terms of the Insolvency Act 24 of 1936, a debtor whose estate has been sequestrated may enter into any type of agreement, as long as prior consent of the trustee is obtained.
2. In terms of the Insolvency Act 24 of 1936, a debtor whose estate has been sequestrated may enter into an agreement to alienate property, as long as prior consent of the trustee is obtained.
3. In terms of the Insolvency Act 24 of 1936, a debtor whose estate has been sequestrated requires the assistance of the trustee in order to institute legal proceedings relating to an injury sustained in a motor vehicle accident.
4. In terms of the Insolvency Act 24 of 1936, a debtor whose estate has been sequestrated may be employed as an electrician without the trustee’s permission in this regard.

Of the above statements, indicate which statement(s) is / are **correct**:

1. Option (i) is correct.
2. Options (ii) and (iii) are correct.
3. Option (iii) is correct.
4. Options (ii) and (iv) are correct.

**Question 1.5**

In January 2020 Company A was placed in liquidation. The liquidator of Company A became aware of the fact that Company A disposed of property worth ZAR 10,000 to Company B for an amount of ZAR 5,000 during September 2019. Directly after the disposition, Company A’s liabilities exceeded its assets by ZAR 6,000. **If the disposition is set aside** –

1. Company B will be required to return ZAR 10,000 to the liquidator of Company A.
2. Company B will be required to return ZAR 6,000 to the liquidator of Company A.
3. Company B will be required to return ZAR 5,000 to the liquidator of Company A.
4. Company B will be required to return ZAR 4,000 to the liquidator of Company A.

**Question 1.6**

With reference to question 1.5 above, what does Company B have to prove in order to ensure that the disposition **is not set aside**?

1. That a disposition was made by the Company A within six months prior to liquidation.
2. That the effect of the disposition is that one creditor was preferred above another.
3. That the disposition was made by the Company A with the intention of preferring one creditor above another.
4. That immediately after the disposition the liabilities of Company A exceeded its assets.

**Question 1.7**

Indicate **the correct order of preference** of the following costs / claims in the free residue account:

1. Costs of sequestration; funeral expenses; income tax; claims secured by a general bond; and, lastly, employee claims.
2. Funeral expenses; costs of sequestration; employee’s claims; income tax; and, lastly, claims secured by a general bond.
3. Funeral expenses; employee’s claims; costs of sequestration; income tax; and, lastly, claims secured by a general bond.
4. Employee claims; funeral expenses; costs of sequestration; income tax; and, lastly, claims secured by a general bond.

**Question 1.8**

Company A wishes to obtain funding in order to expand its cinema and other related businesses. As part of the security package negotiated with the lender, the lender requires Company A to provide its IMAX 3D cinema screens to it as security. Company A makes use of these screens at the cine-complexes at various shopping malls. This form of security is known as a –

1. Pledge.
2. Hypothec.
3. Cession in security of a debt (*in securitatem debiti*).
4. Special notarial bond.

**Question 1.9**

Read the following statements:

1. The Companies and Intellectual Properties Commission plays an active role throughout the business rescue process.
2. Business rescue requires a reasonable possibility of restoring the company in question to a solvent basis.
3. Immediate inability to pay debts is a prerequisite for placing a company under business rescue.
4. A company may be placed under voluntary business rescue by the shareholders of the company in terms of a resolution if the company is in financial distress.

Of the above, which of the following is **correct in relation to business rescue**:

1. Options (i) and (ii) are correct.
2. Options (ii) and (iii) are correct.
3. Options (i) and (iii) are correct.
4. None of the above options are correct.

**Question 1.10**

Which of the following is **incorrect** **in relation to the recognition of foreign judgments**:

1. All foreign judgments are enforced in terms of the Enforcement of Foreign Civil Judgments Act 32 of 1988.
2. All foreign judgments are enforced in terms of the common law.
3. Foreign judgments are directly enforceable in South Africa.
4. All of the above.

**QUESTION 2 (direct questions) [10 marks in total]**

**Question 2.1** **[maximum 4 marks]**

In accordance with the South African common law dealing with cross-border insolvency, how are the **assets of an insolvent governed**? (Briefly refer to the position applicable to both movable and immovable property.)

A foreign officeholder who seeks to deal with company assets located in South Africa is required to apply for recognition to the High Court of South Africa in order to deal with assets in South Africa. The foreign representative will be required to prove proper appointment on his part.

For movable property, such property is regulated by the law of the place of incorporation of the business, although the place where the debtor is domiciled may be used, such that where a foreign judgment is made, the debtor’s movable assets are deemed to have vested in the foreign officeholder.

For immovable property, the foreign office holder must make an application for the recognition of the foreign judgement since the property is governed by the laws of the place where the assets are situated. This is also because immovable assets are not deemed to be vested in the foreign officeholder. In such cases, the court will exercise its discretion when granting/allowing recognition.

Question 2.2 [maximum 6 marks]

What common law requirements need to be met in order for the cause of action established by a foreign judgment to be enforced?

Foreign judgements are not ordinarily enforceable in South Africa, however, common law has

several requirements that ought to be adhered to for enforcement. These are:

1. The judgement must not have been obtained fraudulently.
2. The judgement must not involve the enforcement of a penal or revenue law of the foreign state.
3. The enforcement must not be prohibited by the Businesses Act 99 of 1978.
4. The judgment must be final and conclusive.
5. The foreign court must have had international competence as determined by South African law.
6. The enforcement of the judgement must not be contrary to South African public policy or the principles/concept of natural justice.

**QUESTION 3 (essay-type question) [15 marks]**

**Question 3.1 [maximum 5 marks]**

Mr L and Big Deal Limited entered into a lease agreement in terms whereof Big Deal Limited rents an office from Mr L who is the owner of the office block where the office is situated. After Big Deal Limited has rented from Mr L for over a year, it experiences financial difficulties and is placed in liquidation. Mr L is of the opinion that Big Deal Limited had been a very good tenant that paid its rent timeously up until a few months prior to the liquidation, and he is concerned about the effect of the liquidation of Big Deal Limited on their lease agreement. Advise Mr L in this regard.

First of all, Mr. L ought to be aware that upon liquidation kicking in, the company’s property will vest in the liquidator whose powers require him to take possession of the company’s property, realise and distribute it to the creditors as priority rules require. Other powers he may exercise include the power to terminate a lease with authority from either the court or the creditors. With regards to his claim, Mr. L has a common law right over movable property brought into or upon the leased premises in respect of rent arrears; which is a landlord’s legal hypothec. He may apply to the court for an order to attach the movable property of Big Deal Limited (the company) by attaching the assets on the premises from which he obtains the rights under the hypothec. By this hypothec Mr. L is conferred preference as a creditor of the company.

Mr. L also has the right to terminate the lease agreement on the basis of breach of the agreement by virtue of the failure of Big Deal Limited to pay rent. By doing so, Mr L becomes an unsecured creditor of the company and may proof his debt to the liquidator.

**Question 3.2 [maximum 10 marks]**

Ms A is a schoolteacher by profession. She earns a gross income of ZAR 20,000 per month. In 2018 she borrowed ZAR 1,200,000 from ABC Bank (Pty) Ltd (the bank) in order to purchase an apartment in Cape Town. In order to secure the repayment of the debt, the bank registered a mortgage bond over the apartment. In 2019 the local municipality failed to service the sewerage facilities in the suburb where the apartment is located, which resulted in severe damage to the entire plumbing and drainage system of the apartment complex. Subsequently the apartment decreased in value to ZAR 750,000.

During 2019 Ms A bought a Toyota Yaris motor vehicle from Harry’s Cars and Motorbikes for a purchase price of ZAR 120,000. In terms of the instalment sale agreement entered into between the parties, Ms A’s monthly repayment for the vehicle is ZAR 5,000 per month. While Ms A’s motor vehicle was parked in the parking lot of the school where she teaches, a hail storm hit the area and her vehicle was severely damaged. As a result, the value of her motor vehicle decreased to ZAR 60,000.

At present, Ms A is experiencing difficulties in repaying her debts. She has to make the following monthly payments:

Municipal rates and taxes ZAR 1,500

Cell phone ZAR 1,000

Insurance ZAR 750

Groceries ZAR 4,000

Harry’s Cars and Motorbikes ZAR 5,000

Home loan ZAR 8,500

**TOTAL ZAR 20,750**

Ms A still owes the bank ZAR 800,000 in terms of her home loan agreement and she still owes ZAR 70,000 to Harry’s Cars and Motorbikes in respect of the Toyota Yaris. At present Ms A owes her creditors approximately ZAR 900,000 in total. Ms A cannot afford to pay her creditors the amounts that she owes them. Mr B, the manager of the bank, has also contacted Ms A on a few occasions to enquire as to the outstanding payments in relation to her home loan.

Identify Ms A’s financial status and explain to her what measures she can consider taking in order to manage or resolve her financial problems, as well as what legal requirements will be required of her to succeed in this regard. Further, also explain what measures are available to the bank in an attempt to secure payment of the amount due to them by Ms A, given her financial circumstances.

Ms A is insolvent by virtue of the mere fact that her liabilities exceed her assets. Her liabilities are approximately ZAR 900,000 while her assets are ZAR 810,000 (a motor vehicle valued at ZAR 60,000 and an apartment valued at ZAR 750,000). This also means that she is unable to pay her debts as they fall due.

Despite this status, she may consider applying for a sequestration order under the Insolvency Act in the High Court. The purpose of this proceedings is to approach the court to accept the surrender of her estate for the benefit of all her creditors. In this case Ms A has assets that can be realized in order to make payments including the costs of sequestration. In light of the fact that Ms A cannot afford to pay her creditors the amount she owes them, without necessarily preferring one over the other, obtaining the sequestration order will be beneficial to all her creditors since her assets can yield sufficient dividend. Ms A gains added advantage of the sequestration order since any executions against her is stayed as soon as the sheriff becomes aware of the sequestration of her estate. Upon the sequestration order being granted, Ms A will have the status of diminished legal capacity and there will be restrictions placed on her as a debtor such as, She may continue earning a living as a school teacher but not without written consent from the trustee, cannot enter into a contract to dispose her property without the consent of the trustee. After the order has been granted and kicks in, she will be automatically discharged from the procedure after 10 years, however, if she wishes to reduce this period, she will have to enter into a compromise with her creditors.

Alternatively, Ms A may consider entering into a common law compromise/voluntary agreement with her creditors to agree in a repayment plan over the debt. This process will involve all her creditors where all parties involved have to agree to be bound by the agreement.

ABC Bank (Pty) Ltd (the bank) has a right of security over Ms A’s immovable property i.e. her apartment) by virtue of registration of the mortgage bond over the apartment. The right entitles the bank to have the apartment sold in execution and the proceeds of the sale applied to settle the debt secured by the mortgage bond. The bank however, may also consider filing for compulsory sequestration of Ms. A and arguing that it is owed a liquidated sum that is above ZAR 200.

**QUESTION 4 (fact-based application-type question) [15 marks]**

The directors of i-Orchard (Pty) Ltd (the company) foresee the reasonable likelihood that the company will, within the next six (6) months, be unable to pay its debts as they become due in the ordinary course of business, and will most likely reach a situation where its liabilities exceed its assets. The directors therefore elect to initiate business rescue proceedings and adopt the relevant board resolution, which is subsequently filed with the Companies and Intellectual Property Commission (CIPC). Mr X is appointed as the company’s business rescue practitioner. Various parties are affected by the company’s decision. The following parties approach you as a collective seeking legal advice:

1. Mr A, a successful businessman, lent the company ZAR 700,000 which the company failed to repay. He initiated proceedings against the company in the High Court to reclaim his money and at the time that the company was placed under business rescue proceedings, the court proceedings were almost finalised. Mr A is unsure as to the effect of business rescue on the money owed to him.
2. Ms B has worked for the company for the last five (5) years and she is concerned about the effect that business rescue will have on her employment contract.
3. Mr M leases office space to the company and he is concerned about the effect of the business rescue proceedings on the lease agreement with the company.
4. Ms T is a shareholder of the company and is unsure whether she will lose her shareholding now that the company has been placed under business rescue.
5. Mr H is a director of the company and is unsure as to his position and role now that business rescue proceedings have commenced.

Write a single legal memorandum to all the above-mentioned persons wherein you explain their legal rights, and / or the potential outcome of their respective situations, taking into consideration the business rescue process. The memorandum should further make mention of any potential remedies at their disposal; any practical implications of their respective situations; and also include any considerations in respect of the business rescue plan that the practitioner needs to take cognisance of.

Mr A

There will be a stay of the proceedings by Mr. A because business rescue proceedings result in a moratorium against legal proceedings against the company. The moratorium applies to enforcement against the company or any property relating to the company or lawfully in its possession. None the less, he may seek permission from the business rescue practitioner or the court to lift the moratorium.

Ms B

The entry of the company into a business rescue proceedings does not affect Ms B’s employment contract since during the proceedings, employees of the company continue to be employed on the same terms and conditions as before the proceedings except to the extent that changes occur in the ordinary course of attrition, or the employees and the company agree upon different terms and conditions in accordance with applicable labour laws.

Mr M

Upon commencement of business rescue proceedings, the moratorium that kicks in automatically stays legal proceedings, execution & enforcement actions by creditors against the company, which includes a lessor who has the intention of enforcing any security without leave of the court. The moratorium, does not prevent a landlord from cancelling a lease agreement with his tenant as the cancellation of an agreement does not amount to enforcement action by the landlord against his tenant. In relation cancellation of leases, the court in Stamfordhill CC v Velvet Star Entertainment CC held that, “This would not permit the business rescue practitioner to remain in occupation of the property, for the respondent to continue trading, and not honour its obligation to pay rent. It had to honour its obligations in terms of the contract incurred prior to the business rescue proceedings commencing, and as it had not done so, the applicant was entitled to cancel the contract”.

In Kythera Court v Le Rendez­Vous Cafe CC and Another, the Court held that during business rescue proceedings, eviction proceedings may be brought when the business rescue practitioner has not suspended the obligations of the tenant under a lease or the landlord has validly cancelled the lease due to non-payment.

Therefore, Mr M will be able to exercise his right to cancel the lease.

Ms T

The rights of any class of shareholders are not altered by the rescue plan. The secondary purpose of business rescue proceedings, where it is not possible for the company to continue as a going concern, is to have a better return for the company’s creditors or shareholders than would result from the immediate liquidation of the company. During the business rescue proceedings the shareholders are entitled to participate in any court proceedings arising during the business rescue proceedings, to receive notice of any relevant event concerning the business rescue proceeding, to vote to approve or reject a proposed business rescue plan and participate in the company’s business rescue as provided for in the Companies Act.

Mr H

Directors are not removed from office during rescue proceedings. They are, however, subject to the authority of the business rescue practitioner. During the business rescue proceedings, directors have a duty to deliver to the business rescue practitioner all books and records that in their possession and which relate to the affairs of the Company.

Mr X

The business rescue practitioner supervises and advises management and has complete control of the company in the place of the board of directors. He investigates the affairs of the company in order to consider whether the company may be rescued. Further upon the development of a business rescue plan the business rescue practitioner convenes and presides over a creditors’ meeting for the purpose of considering the plan. He has the power to delegate, appoint or remove any person from the management of the company.

**\* End of Assessment \***