



## SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

### SOUTH AFRICA

Commented [SL1]: TOTAL = 39/50  
78%

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.

Commented [SL2]: SUB-TOTAL = 9

#### **Question 1.1**

Commented [SL3]: 1

Choose the **correct statement**:

- (a) 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.
- (b) 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.
- (c) 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.
- (d) 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**

Commented [SL4]: 1

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

- (a) 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.
- (b) 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.
- (c) 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.
- (d) None of the above are correct.

### Question 1.3

Commented [SL5]: 1

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

- (a) Terminating a lease agreement prior to the general meeting.
- (b) Instituting legal proceedings.
- (c) Selling any movable property of the company prior to the general meeting.
- (d) Selling any immovable property of the company prior to the general meeting.

### Question 1.4

Commented [SL6]: 1

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

- (i) 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.
- (ii) 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.
- (iii) 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.
- (iv) 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**:

- (a) Option (i) is correct.
- (b) Options (ii) and (iii) are correct.
- (c) Option (iii) is correct.
- (d) Options (ii) and (iv) are correct.

### Question 1.5

Commented [SL7]: 1

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 –**

- (a) Company B will be required to return ZAR 10,000 to the liquidator of Company A.
- (b) Company B will be required to return ZAR 6,000 to the liquidator of Company A.
- (c) Company B will be required to return ZAR 5,000 to the liquidator of Company A.
- (d) Company B will be required to return ZAR 4,000 to the liquidator of Company A.

**Question 1.6**

Commented [SL8]: 0

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**?

- (a) That a disposition was made by the Company A within six months prior to liquidation.
- (b) That the effect of the disposition is that one creditor was preferred above another.
- (c) That the disposition was made by the Company A with the intention of preferring one creditor above another.
- (d) That immediately after the disposition the liabilities of Company A exceeded its assets.

**Question 1.7**

Commented [SL9]: 1

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

- (a) Costs of sequestration; funeral expenses; income tax; claims secured by a general bond; and, lastly, employee claims.
- (b) Funeral expenses; costs of sequestration; employee's claims; income tax; and, lastly, claims secured by a general bond.
- (c) Funeral expenses; employee's claims; costs of sequestration; income tax; and, lastly, claims secured by a general bond.
- (d) Employee claims; funeral expenses; costs of sequestration; income tax; and, lastly, claims secured by a general bond.

**Question 1.8**

Commented [SL10]: 1

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 –

- (a) Pledge.
- (b) Hypothec.
- (c) Cession in security of a debt (*in securitatem debiti*).
- (d) Special notarial bond.

**Question 1.9**

Commented [SL11]: 1

Read the following statements:

- (i) The Companies and Intellectual Properties Commission plays an active role throughout the business rescue process.

- (ii) Business rescue requires a reasonable possibility of restoring the company in question to a solvent basis.
- (iii) Immediate inability to pay debts is a prerequisite for placing a company under business rescue.
- (iv) 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**:

- (a) Options (i) and (ii) are correct.
- (b) Options (ii) and (iii) are correct.
- (c) Options (i) and (iii) are correct.
- (d) **None of the above options are correct.**

**Question 1.10**

Commented [SL12]: 1

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

- (a) All foreign judgments are enforced in terms of the Enforcement of Foreign Civil Judgments Act 32 of 1988.
- (b) All foreign judgments are enforced in terms of the common law.
- (c) Foreign judgments are directly enforceable in South Africa.
- (d) **All of the above.**

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

Commented [SL13]: SUB-TOTAL = 10

**Question 2.1 [maximum 4 marks]**

Commented [SL14]: 4

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.)

South Africa common law dealing with cross-border insolvency of movable and immovable property are dealt with by two different laws. The movable property of the debtor is dealt with by the lex domicili of the debtor and the immovable property is dealt with by lex situs. The movable property covers all the movable property world-wide of the debtor. For a juristic person like a company, the lex domicili is the place of incorporation or the place of its principal business operations and for a natural person its lex domicile is its place of abode. For the immovable property, the lex situs is the place where the immovable property is situated.

**Question 2.2 [maximum 6 marks]**

Commented [SL15]: 6

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

A foreign judgment is not directly enforceable in South Africa but it establishes a cause of action that will be enforce if the following common law requirements are met:

- The foreign court must have had international competence as determined by South African law
- The judgment must be final and conclusive
- The enforcement of the judgment must not be contrary to South Africa public policy on the concept of natural justice
- The judgment must not have been obtained fraudulently
- The judgment must not involve the enforcement of a penal or revenue law of the foreign state and
- Enforcement must not be prohibited by the Protection of Business Act 99 of 1978
- South African courts will also consider the principles of comity that exists between South Africa and the foreign state and whether it is just and equitable to recognize the judgment

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

Commented [SL16]: SUB-TOTAL = 13

#### 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.

Commented [SL17]: 3  
Mention could further have been made that the liquidator must perform in terms of the contract if he chooses to be bound. Also, discussion of the claims and their ranking that Mr L would have against Big Deal Limited

The land lord must be informed that the lease is not automatically terminated when a leesees is in liquidation. However, the liquidator must formally write to terminate the lease within 3months of his appointment or the lease becomes automatically terminated. Upon termination of the lease agreement, the landlord cannot demand specific performance of the agreement but must resort to breach of contract reliefs in the court due to the liquidation order. And he has hypothec over the property.

#### Question 3.2 [maximum 10 marks]

Commented [SL18]: 10

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
<b>TOTAL</b>	<b>ZAR 20,750</b>

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 a natural person and a debtor under the Insolvency Act of 1936 who is subject to both voluntary and compulsory sequestrations. Ms A has to understand that she may approach the courts to accept the surrender her estate for the benefit of her creditors. The law does not require anyone to enter bankruptcy proceedings and should an insolvent apply for a voluntary sequestration the court still has discretion as to whether to grant the order or not, even in instances where the debtor has complied with all the relevant requirements and formalities as expressed in Insolvency Act §6(!)The courts in cases that involves some voluntary sequestration filings have decided as follows: "factors that influence the discretion of the court may include a debtor's motive in applying for sequestration" (Naidoo & Ano v Matlala NO & Ors. 2012(1) SA 143 (GNP); "the debtor's creditors are not pressing him for payment and are willing to give him time or accept payment in monthly instalments" (Ex parte Kruger 1928 CPD 233); and "the debtors financial problems could be dealt with more appropriately under the National Credit Act 34 of 2005" (Ex parte Ford and two similar cases 2009 (3) SA 376 (WCC) South Africa is now following the international trend of a regime for treating the insolvency of natural persons by not only pursuing the objectives of increasing payments to individual creditors and enhancing a fair distribution of payment among the collective of creditors, but just as importantly such a regime pursues the objectives of providing relief to debtors and their families and addressing wider social issues in achieving those objectives, a regime for the insolvency of natural persons should strive for a balance among competing interests.

Ms A has also available alternative measures to sequestration which include a debtor overburdened in terms of the National Credit Act 34 of 2005 as a result of credit granted under and regulated by this Act, to apply for review. The debt review may result in a formalised repayment plan which takes into account all the debts and the necessities of the debtor in the restructuring of the payments to be within a certain



time frame. Ms A may also enter into a common law compromise (voluntary agreement) with her creditors regarding a release or novation (repayment plan with any or all of her creditors regarding her existing debts. Ms. A must understand that making a common law compromise with her creditors also results in an act of insolvency being committed by her.

The bank on their part had an option of bringing an action in court for collection of their loan to Ms A and following it up to secure a judgment against her, executing the judgment in an enforcement of the judgment. The bank can also seek for compulsory sequestration against the debtor since its loan with the debtor exceeds the limited requirements of the law. Ms. A owes the bank some ZAR 800,000 as against ZAR 100 that the bank must establish to start compulsory sequestration order against the debtor. The bank can also enter into common law compromise arrangement with the debtor and can also seek foreclosure of the mortgage agreement in court.

**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:

- (i) 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.
- (ii) 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.
- (iii) 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.
- (iv) 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.
- (v) 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.

MEMEORANDUM

To: Mr A, Ms B, Mr M, Ms T, and Mr H

From: 202021IFU-268

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**Commented [SL19]: 7**

Further to the notes in the text below, discussion should have included:

- Treatment of contracts under business rescue
- Rights of shareholders
- Binding offer to purchase voting rights in terms of plan
- Cram-down

Date: June 13, 2021

RE: Legal Memorandum OF Business Rescue Process

### QUESTION PRESENTED

Explain the legal rights and or the potential outcome of their respective situations taking into consideration the business rescue process; mention any of the potential remedies at their disposal; any practical implications of their respective situations, and include any considerations in respect of the business rescue plan that the practitioner needs to take cognisance of

### BRIEF ANSWERS

Mr A, a businessman lender has rights to compulsory sequestration of the debtor, compulsory business rescue of the debtor, common law process of composition and legal action for judgment and enforcement of the judgment.

Ms B is an employee of the company. Her employment contract with the company will not terminate upon the filing of the business rescue proceedings but may be affected by the usual route of attrition and compromises between employer and employees in accordance with the applicable labour laws prevailing.

Mr. M is a lessor of immovable property. Currently, lessors do not have preferential claims for rent in South Africa. The past due rent if any will be subsumed under the business rescue plan and the rent due during the duration of the business rescue proceedings will be treated as post-business rescue debts.

MS T, is a shareholder of the financially distressed company. Shareholders are equity security holders of the company and thus she will have to await the outcome of the business rescue proceedings since all creditors both secured and unsecured must be paid in full before the equity security holders are paid anything at all.

Mr H is a director of the financially distressed company, Upon the filing of the business rescue proceedings, his function as a director is suspended and if not authorized by the business rescue practitioner to perform a function on behalf of the company, he cannot participate in the management of the company.

### STATEMENT OF FACTS

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.

- (i) 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 the business rescue on the money owed to him
- (ii) 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
- (iii) 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

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**Commented [SL20]:** Please note that the company is under business rescue. A discussion on sequestration is thus not relevant

- (iv) 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
- (v) Mr H is a director of the company and is unsure as to his position and role now that business rescue proceedings have commenced.

### DISCUSSIONS

This problem concerns the business rescue proceedings in South Africa. In South Africa, the reorganisation of companies can be achieved by commencing business rescue proceedings or through a pre- or post- composition with creditors (only post-liquidation compositions are statutorily regulated, and the company may also undergo informal out-of-court restructuring process).

The purpose of business rescue or restructuring in South Africa is to facilitate the rehabilitation of a financially distressed company. A company is regarded as financially distressed if it appears reasonably unlikely that the company will be able to pay all its debts as they fall due and payable within the ensuing six (6) months or it appears reasonably likely that the company become insolvent within the immediate ensuing six (6) months.

Business rescue proceedings may be commenced via a voluntary or compulsory route. Voluntary business rescue proceedings is initiated by the board of directors of the company upon adoption of a resolution to this effect and the proceedings become effective once this resolution is filed with the Companies and Intellectual Property Commission (CIPC). Upon adoption of this resolution, the board of a company must also have reasonable grounds to believe that there appears to be a reasonable prospect of rescuing the company.

Compulsory business rescue is initiated by a court after an application is brought by an affected person.

The Companies Act 2008 clearly states that rescuing a company entails maximis[ing] the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company. Thus, in the instance when there is no longer a reasonable prospect that the company can be rescued, the business rescue practitioner has to apply to the court for an order placing the company under liquidation.

Business rescue proceedings result in a moratorium on legal proceedings against the company. The moratorium is inclusive of enforcement action against the company or in relation to any property belonging to the company or lawfully in its possession. The business rescue practitioner or the court may grant permission to lift the moratorium in appropriate cases.

The most important functions of the business rescue practitioner are to investigate the affairs of the company and to develop and implement a business rescue plan. Upon investigating the affairs of the company, the business rescue, as an officer of the court being subject to the duties and liabilities of a director of a company, must consider whether there is any reasonable prospect of the company being rescued. If he is of the opinion that there is no reasonable prospect for the company to be rescued, he should inform the court, the company and all affected persons as such, and request the court to order for the discontinuance of the company's rescue and place the company under liquidation. If he is of the opinion that the company is not under financial distress, he must inform the court, the company and all affected persons and apply to the court for an order to discontinue the business rescue proceedings (for compulsory business rescue) or file a notice of termination with the CIPC (for voluntary business rescue).

Mr A is a businessman who has lent the company ZAR 700,000 which seems uncollateralized by the facts of the case and has sued the company to recover the loan. The

case is in its final stages, but business rescue proceedings come with a moratorium which stays all legal proceedings and enforcements of actions, thus the legal action of the lender, Mr. A must await the outcome of the business rescue proceedings. The court or the business rescue practitioner, Mr X may cause the moratorium to be lifted but the legislature did not give any room for the lender in the instant of Mr. A any way out while the business rescue proceeding is on-going.

MS B is an employee of the company and she is worried about the effect of the business rescue proceeding on her employment contract. Ms B's employment contract will still be operational except to the extent that changes may occur in the ordinary course of attrition, or the employees and the company may agree upon different terms and conditions of service in accordance with applicable labour laws.

Mr. M is a lessor of the company. Currently, South Africa laws on leases is that the rent is not a preferential claim. Any past due rent will be treated as a pre-business rescue debt and will not be treated as a preferential claim. Rents falling within the period of the business rescue proceeding will be treated as preferential claim. Leasing contract is an executory contract and therefore it is not automatically terminated upon commencement of the business rescue proceeding. The business rescue practitioner may however elect to either entirely, partially or unconditionally suspend the company's obligations or cancel the executory contract by a court order, thus giving the lessor a right to demand breach of contract remedies only. Mr M may also choose to terminate the executory lease contract by a court order and he may attach movable property brought on to the leased property as long as rent is owing.

Ms T is a shareholder of the company and thus has equity security interest in the company. The business rescue proceeding is considered under two principles by the Company Act 2008: (i) that the company is under financial distress and there is a reasonable prospect that by making use of business rescue the company will continue in existence on a solvent basis; or (ii) where there is no reasonable prospect of the company continuing in existence, but business rescue will result in a better result for creditors or shareholders than immediate liquidation of the company. In the instance there is no longer a reasonable prospect that the company can be rescued, the business rescue practitioner has to apply to court for an order placing the company under liquidation. Ms T is an equity security holder as a shareholder and not a creditor, thus her interest must hold until all the creditors, both with collateral as secured creditors and those without collateral to their loans as unsecured creditors are fully satisfied before her, an equity security holder as a shareholder will be considered from the remains of the company's extra properties, if any.

Mr. H is a director of the financially distressed company under business rescue proceedings. While under business rescue proceedings, the director is bound by the duty to disclose personal financial interest or those of related persons, but is relieved from the duties of a director set out in § 76 and from liabilities under § 77 of the Companies Act 2008 provided he acts under the authority and according to the instructions or directions of the business rescue practitioner. The liabilities for which a director remains liable under § 77 of the Companies Act 2008 are in respect of loss sustained by the company as a result of:

- Acting on behalf of the company despite knowing that he lacks authority
- Acquiescing in the carrying on the company's business despite knowing that it is being conducted recklessly, with gross negligence or with intent to defraud or for a fraudulent purpose, and
- Being a party to an act or omission knowing that it is calculated to defraud a creditor, employee or shareholder or the company or that it has another fraudulent purpose.

### CONCLUSIONS

The lender, the employee, the lessor, the shareholder and the director, all of the financially distressed company, i-Orchard (Pty) Ltd have real concerns about the impact of the filed business rescue proceedings on their individual relationships with the company. The

**Commented [SL21]:** Discussion should have included the role of the director in relation to the business rescue practitioner given the fact that the company is under business rescue

company will be granted moratorium against all legal actions by any of these individuals against the company during the pendency of the business rescue proceedings. The business rescue practitioner, Mr X of the company will have to come up with a business rescue plan that satisfies the conditions for the business rescue application: that the practitioner believes that the plan will resuscitate the business and keep it in continuous solvent existence after the rescue proceedings or if that is not realistic then the business rescue proceedings will make it possible for the creditors to have more value upon the liquidation of the company than they would have upon its immediate liquidation. The business rescue practitioner has the duty to investigate the company to determine how it got into the financially distress position and further actions to be taken by the appropriate authorities against those whose actions or omissions caused the company to fall into such insolvency distress if faulted.

**\* End of Assessment \***