



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

SOUTH AFRICA

Commented [SL1]: TOTAL = 41/50

82%

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.

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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 rescue 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 rescue 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

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

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

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.

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Commented [SL6]: 1

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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**?

- (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

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

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

Read the following statements:

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

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No answer selected.

Commented [SL9]: 1

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Commented [SL11]: 0

- (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

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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]

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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 is not a party to any treaty or convention dealing with cross-border insolvency. Therefore in dealing with cross-border insolvency in South Africa one has to rely on common law principles. In determining which principles would apply to a cross-border matter, a distinction needs to be made between movable and immovable property, as well as the categorization of the parties involved. By the South African Law, upon granting of a sequestration order by the court, the estate of the insolvent vests in the master. Upon the appointment of a trustee, the estate will vest in the trustee. The ability of a foreign representative to deal with South African assets depends on a division of types of property and the classification of the persons involved. Where the debtor is a natural person having a movable property, the law applicable is the law of the place where the debtor is domiciled (lex domicilii). In the case of Trustees of Howse, Sons & Co. v. Trustees of Howse, Sons and Co., where De Villiers CJ said that "the general rule relating to movable or personal estate is that it is subject to same law as that which governs the person of the owner, in other words the law of his domicile. Therefore, where a natural person is declared insolvent by the court of his domicile, the implication

is that he is divested of all his movables throughout the world and invariably in South Africa. Although it is not compulsory for the representative to obtain recognition when dealing with movable property of an insolvent, it is prudent to do so because the frequency of seeking for recognition has raised the requirement into a principle. In *Ex Parte Palmer: in re Hahn*, the court held that with regards to movable property, a formal application for recognition is not strictly necessary, that making such an application has elevated it into a principle. Formal recognition is usually the only route to follow with regards to movables. However, if the debtor is a company, jurisdiction is governed by the law of the place of incorporation, but where the principal place of business is different from the place of incorporation, the law of the principal place of business shall govern the assets of the insolvent. In *Ex parte La monica v. In re Eastwind Development SA (Baitic Reefers Management Ltd intervening)* 2011 (3) SA 164(WCC), the court held that a foreign officeholder required recognition by an order of a South African court before the foreign office holder was entitled to deal with local assets. The representative of the debtor company has an obligation to seek such recognition. Such a representative has no right to deal with the assets in South Africa until such recognition is granted. The representative however, needs to prove that he was appointed where the company is registered or has its principal place of business and that his claim is genuine. On the other hand where the debtor's property is an immovable property, the law of the place where the immovable property is situate (*lex situs*) becomes applicable, regardless of whether the debtor is an individual or a company (juristic person). Where the sequestration of an estate is outside South Africa, it does not divest the insolvent of immovable property that is situate in South Africa, as was seen in the case of *Deutsche Bank AG v. Moser* 1999 (4) SA 216 (C) 219J.]

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?

[The common law principles will be applicable in the recognition of foreign judgments by South African courts, with the exemption of Namibia. Foreign judgments are not directly enforceable in South Africa, but establishes a cause of action that will be enforced by South African Court on the fulfilment of the following common law requirements. First, the foreign court must have had international competence as determined by South African law. Secondly, the said foreign judgement sought to be enforced must be a final and conclusive judgment. The judgment sought to be enforced must not be contrary to South African public policy or the concept of natural justice. The said judgment must also not have been obtained fraudulently. The foreign judgment sought to be enforced must not involve the enforcement of a penal or revenue law of the foreign state. The said enforcement must not also be prohibited by the Protection of Business Act 99 of 1978. The principles of comity existing between the foreign country and South Africa must be considered by the court, as well as how just and equitable recognizing the judgement is. The South African courts based on the principle of international obligations recognised foreign judgments, in the unreported case of *Overseas Shipholding Group, Inc and 180 others*, the court recognized an order granted by the US Bankruptcy Court, Delaware, ordering that an automatic stay and related provision of Section 362 of the US Bankruptcy Code would apply in South Africa. In the same vein in the unreported case of *OXL NV* the High court in South African also recognised a foreign business rescue order made in a foreign judgment.]

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

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Question 3.1 [maximum 5 marks]

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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.

[The liquidation of a company does not automatically terminate a lease agreement between a Landlord and a tenant. Once , the lease is still intact at the time of a liquidation application, the Landlord will not be in a position to terminate the lease. The decision to continue or not to continue, falls within the sole discretion of the trustee appointed to liquidate the insolvent estate. The trustee has the discretion to within 3 months after his appointment , notify the Landlord whether he desires to continue with the lease on behalf of the estate. The trustee may immediately cancel the lease by means of a written notice. By Section 37(2) of the Insolvency Act, where the trustee fails to cancel the lease within three months period of his appointment, the lease agreement is deemed to be automatically cancelled. Any rent that became due from the date of liquidation to the date of cancellation of the lease will be treated as preference claim and paid out of the administration costs, while any other claim as a result of breach of the lease will be treated as a concurrent claim. In the case of *Ellerine Brother Limited v. McCarthy Limited* is an example of where the tenant is in breach of the lease before liquidation. It was held that where a demand notice was served before a provisional liquidation, notifying the tenant of its breach/ arrears payment and the tenant/ trustee still fails to comply with the payment, the landlord will be entitled to terminate the agreement. Where, however the tenant is not in breach of the lease at the time of its liquidation application, only the liquidator can elect to cancel the lease. It was the Court's position that just like the case in any other uncompleted contract, the liquidator inherits the lease in its entirety. The creation of the concursus creditorum does not in any way terminate the continuous operation of a lease agreement to which the insolvent is a party. The concursus neither alters nor suspends the rights and obligations of the parties, the liquidator by stepping into the shoes of the insolvent must perform whatever is required of the insolvent in terms of the lease, including unfulfilled past obligations of the tenant. The landlord does not have the right to cancel the lease or re-let the premises. The landlord needs to wait for the liquidator to decide to exercise his right to elect. In the instant case the Landlord did not make give the tenant any demand notice for its arrears of rent before the tenant was placed on liquidation, the tenant had been a good tenant who paid his rent timeously, but due to its financial difficulty has not paid its rents for a few months. This made the tenant, Big Deal limited to be in breach of the lease agreement at the time of its liquidation. However, because the Landlord Mr. L failed to give Big Deal a demand notice, the Landlord cannot terminate the lease agreement. I advise Mr. L to give Big deal three months to either pay its rent or the lease will automatically be deemed cancelled by the law. Mr. L can subsequently go ahead to re-let the premises and maintain an action against the insolvent estate for its unpaid rents and for damages. The rent due for the three month period will form part of the cost of the sequestration. The Landlord is entitled to a preference claim against the tenant's estate, but will

have to wait for the money to be paid out of the liquidation. Mr. L could also obtain a hypothec over immovable property brought into the premises in order to recover any rent in arrears due before sequestration in case of immovable 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
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 bankrupt, she is owing her creditors approximately ZAR 900,000 and cannot afford to pay her creditors the ZAR 900,000 she is owing them. Ms A's gross income as a school teacher is ZAR 20,000, while her present monthly payments is a total of ZAR 20,750. Mr. B, the bank manager has made a demand for the outstanding payments on few occasions but Ms A has not been able to pay back. Ms A qualifies as a "debtor" for the purposes of a consumer insolvency, which includes a person or partnership or

the estate of a person or a partnership which is a debtor in the usual sense of the word, except a body corporate or a company or other association of persons which may be placed in liquidation under the laws relating to companies. The measures Ms. A can take in order to manage or resolve her financial problems is to commence sequestration proceedings. Ms. A cannot apply for administration because her debts are above ZAR 50,000. Sequestration has remained an effectual solution available to debtors who are unable to pay off their existing debts or whose financial liabilities exceed the value of their assets. Once a sequestration order has been passed, it is not all property of the insolvent estate that vests on the master and then the trustee. Some properties are exempted, the debtor's wages or remuneration for work done are part of the exempted properties. Also, Ms. A's profession as a teacher is allowed also during sequestration. The implication is that Ms. A could keep teaching and receiving her salary which will help her to keep paying off her debts. Sequestration has the advantage that it gives an automatic stay on civil proceedings and stay of execution as soon as the sheriff becomes aware of the sequestration of the debtor's estate. Sequestration is suited to cases where a consumer is faced with debts that exceed their assets, making it possible for a debtor to be declared insolvent. Sequestration proceedings start with an application for a sequestration order. Sequestration proceedings may be commenced by either voluntary surrender under Section 3 of the Insolvency Act or compulsory sequestration, under Section 9 of the Insolvency Act. Under voluntary surrender an insolvent debtor is the one that approaches the court to accept the surrender of his estate for the benefit of his creditors, while under compulsory sequestration it is one or more creditors of the debtor who approach the court for the sequestration of the debtor's estate. Sequestration only starts after an order has been granted by the High court. However, in order for a sequestration proceeding to succeed the debtor must be able to prove some requirements. There is no threshold for qualifying for a sequestration via the voluntary surrender route, but the debtor must prove, first, that there will be sufficient free residue to cover the costs of sequestration, secondly, the debtor must be able to convince the court that sequestration will be to the advantage of the creditors. The implication of these requirements is that the debtor must have sufficient property to meet the costs of sequestration and where a debtor only has liabilities and not assets, the debtor should not surrender his estate. In the instant case there is a mortgage bond over Ms. A's apartment, while the Toyota vehicle whose value is rather very small compared to the outstanding debt has an instalment sale agreement over it. Also, a sequestration is taken to be of advantage to the creditors if it yields at least a sufficient and non-negligible dividend. The advantage must also be reasonable and not too remote. For compulsory sequestration, a creditor must be able to prove that he has a liquidated claim of at least ZAR100, or if two or more creditors are applying they must have liquidated claims against the debtor amounting, in aggregate, to not less than ZAR 200. If the creditors commence a compulsory sequestration, it is usually a better option because the burden of proof is less. In the instant case the amount owed is more than ZAR 200 for more than one creditor, the amount involved is also a liquidated claim. However, proving that there is free residue to cover costs of sequestration will be difficult, because Ms. A appears to have only liabilities and not sufficient assets. Also, there must also be reason to believe that the sequestration will be to the advantage of the creditors. There must be a reasonable prospect, that is not too remote to be of any relevance. But once the sequestration order is granted, it gives the insolvent the status of a diminished legal capacity. The implication is that the insolvent is divested of all of his assets, which now vests in the master and subsequently the trustee. Some restrictions are placed on the debtor and his lifestyle that could make more money available for repaying her debts. However, considering the fact that Ms. A lacks free residue that creditors could depend on for paying for the outstanding balance. The severe damage to the plumbing of Ms. A's apartment has reduced the value of her apartment, the damage her Toyota vehicle suffered has also reduced the value of her

vehicle. If Ms. A applies for voluntary surrender she has no free residue. That being the case Ms. A can make a compromise with her creditors. Ms. A may shorten her insolvency period by making a compromise with her creditors after an order for sequestration has been granted. Through a scheme of arrangement Ms. A could secure a delayed repayment plan from her creditors, since out of the expected monthly payment of ZAR 20,750 she monthly income is at ZAR 20,000. With such an arrangement Ms. A will be able to clear her debt, even though in a longer period of time, since Ms. A has a steady source of income. As for the bank, in insolvency there are three types of creditors. Secured, preferent and concurrent creditor. The bank is a secured creditor having registered a mortgage bond over Ms A's apartment. As secured creditors the bank should receive payment from the assets they hold as security, while unsecured creditors are paid from any free residue of the estate. Therefore the bank can take steps to enforce their security, the bank can recover its loan whose outstanding amount is ZAR 800,000 while the apartment's present value is ZAR 750,000. If the outstanding balance is ZAR 50,000 Ms. A can gradually pay back the balance from her salary.]

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.

[Business rescue comes with a lot of effects and implications. By section 133 of the South African Companies Act, one of the effect of the commencement of business rescue

Commented [SL19]: 10

Discussion could have included approval of plan, purchasing of voting rights, cram-down. Also see comments below in text

proceedings is a Statutory moratorium. Statutory moratorium is the stay on institution of legal proceedings or enforcement of any action against the company in financial difficulty from the moment that business rescue proceedings commences. The implication is that no enforcement action or execution order can be commenced. There are however, a few exception, like when the leave of the court or written consent of the business rescue practitioner was obtained, or a criminal proceedings against the company or any of its directors or as a set off against any claim made by the company, proceedings by a regulatory authority, where the company is acting as a trustee over a property. However, by Section 147(1)(a)(ii) of the South African Companies Act, a business rescue practitioner may upon his appointment receive a proof of claims by creditors at the first meeting of creditors. By section 145 of the South African Companies Act each creditor is entitled to a notice of each court proceeding, decision, meeting or other relevant events concerning the business rescue proceedings. The business rescue practitioner after consulting with the creditors, and other affected persons must prepare a business rescue plan. The business rescue practitioners will then accommodate the interest of the different creditors in the business rescue plan. If the rescue plan does not alter the rights of any class of holders of the company's securities, the preliminary approval constitutes final approval. But if the rescue plan does alter the rights of holders of securities, the holders of the securities need to vote to approve the plan. Each creditor has the right to vote to amend, approve or reject a proposed business rescue plan. Once the plan is approved by 75% voting interest and 50% independent creditors' voting interest, if any, the plan becomes binding on the company, each creditor of the company and holder of securities, whether or not they voted in favour of the plan. A creditor is not entitled to enforce any debt owed by the company before the commencement of the business rescue process, except to the extent provided for in the business rescue plan. Therefore, the effect of the commencement of the business rescue proceeding is that there is an automatic stay on Mr. A's action to reclaim his ZAR 700,000. The extent to which Mr. A can recover his ZAR 700,000 depends on the approved business rescue plan. The business rescue practitioner is bound to follow the business rescue plan.

Business rescue has some effect of employees too. By section 136 of the South African Companies Act during a company's business rescue proceedings, the employees of the company continue to be employed on the same terms and conditions as immediately before the commencement of the rescue proceedings. There are however, a few exception like where the changes in employment occurred in the ordinary course of attrition or where the employees and the company agreed on different terms and conditions based in their applicable labour laws. According to S. 136(1)(b) any retrenchment contemplated in a business rescue plan, must be subject to section 189 and 189A of the labour relations Act 66 of 1995 and other applicable employment related legislation. Section 35A and 35B of the insolvency Act No. 24 of 1936 allows a rescue practitioner to cancel or suspend any provision of an agreement to which the company is a party at the commencement of the business rescue excluding an agreement of employment. By section 144 of the Companies Act, during a company's business rescue proceedings, any employee of the company shall to the extent his remuneration or any other money relating to the employment has become due and payable before the commencement of the business rescue proceedings but remains unpaid, shall be treated as a preferred unsecured creditor. In view of that Ms. B's employment contract is not affected by the business rescue. The implication is that in the instant case Ms. B continues to be employed the company, on the same terms and conditions as before the commencement of the business rescue proceedings. Ms. B continues to receive her salary, since there is no attrition going on in the company presently in the ordinary course of business, unless there is any agreement to the contrary between Ms. B and the company. Also, if the business plan provides for any retrenchment, it must be subject the applicable labour law.

Commented [SL20]: Discussion on ranking of salary claim could also have been included

Section 134(1)(c) of the South African Companies Act provides that despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of a company during business rescue proceedings, even if, the property is owned by the company, except to the extent that the business rescue practitioner consents in writing. The practitioner also, must not unreasonably withhold consent, he must put into consideration the purpose of business rescue proceedings, the circumstances of the company, the nature of the property and the rights claimed in respect of it according to Section 134(2) of the South African Companies Act. [The implication is that the lease over the office space occupied by i-Orchard (pty) Ltd continues notwithstanding the provision of the lease agreement. Mr. M can only take an action over the office space with the consent of the business rescue practitioner in writing. The business rescue practitioner in exercising his discretion must consider the circumstances of the company and must ensure his decision advances the purpose of business rescue proceeding. What happens to the lease agreement depends on the business rescue practitioner.

Commented [SL21]: Discussion to have included the treatment of executory contracts; and a discussion of relevant case law. Cloete Murray especially, as cancellation may indeed take place as it is not prohibited by the moratorium.

By section 137(1) of the South African Companies Act, an alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business is invalid unless the court directs otherwise or where it is so agreed in the business rescue plan. In the instant case Ms. T will not lose her shares in i-Orchard(pty) LTD unless there is alteration in i-Orchard shareholding as a result any transfer in the ordinary course of business, that results in Ms. T losing her shareholding. Alteration in i-orchard's shareholding can also be possible if the court so directs or it was so agreed in the business rescue plan, such alteration may result in Ms. T losing her shareholding, outside these instances, Ms. T cannot lose her shareholding.

By section 137(2) of the Companies Act a director is allowed to continue to exercise the functions of a director during a company's business rescue, subject to the authority of the business rescue practitioner. Each director has a duty to exercise any management function within the company in accordance with the express instructions or directions of the business rescue practitioner. By Section 137(3) of the Companies Act, each director has a duty to provide the business rescue practitioner with any information he requires about the company's affairs. By section 137(4) of the Companies Act any action taken by a director on behalf of the company requiring the approval of the business rescue practitioner, is void unless approved by the business rescue practitioner. The business rescue practitioner may bring an application during the business rescue proceeding for the removal of a director for failure to comply with the above requirements or where the directors action or omission has impeded or is impeding the practitioner in performance of his duties, or is affecting the management of the company or the development of a rescue plan. In the instant case if the business rescue practitioner did not remove Mr. H for any of the above reasons, Mr. H can only perform the functions, instructions and directions of the business rescue practitioner. Where Mr. H performs any action that requires the business rescue practitioner approval without the necessary approval, such action can be voided. Mr. H must also give the business rescue practitioner every support or information he needs to succeed in his role.]

*** End of Assessment ***