



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

SOUTH AFRICA

Commented [SL1]: TOTAL = 27/50
54%

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: 202021FU-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]: 0

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

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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

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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

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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

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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

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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

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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

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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

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]

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.)

South African law on cross border insolvency law is controlled by common law principles. Local assets in a cross border case are determined based on the types of property and classification of persons. Property is classified as movable or immovable. Movable property is governed by the law of the natural persons domicile. The debtor declared insolvent by the court of his domicile is thus automatically divested of his movables through the world including south Africa. A foreign representative must be prudent in seeking recognition before dealing with local courts as laid down in the case of *Ex parte Palmer: In re Hahn 1993 (3) SA 359 (C)*. for instance, in the case of a company, the place of incorporation may be substituted for the place of domicile but the principal place of business may afford jurisdiction even if the place of the registered office is elsewhere.

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Commented [SL14]: 4

In the case of immovable property governed by law of the place where the immovable property is situated regardless of whether the debtor is individual or a juristic person, the sequestration of an estate outside South Africa does not divest the insolvent of the immovable property situated in South Africa. [Ex parte BZ Stegmann 1902 TS 40 47-8, Deutsche Bank AG v. Moser 1999 (4) SA 216 (C) 219J. Recognition must be applied for in this regard for the protection of local creditors and the division of the estate – which can be equally divided and the dividends due to the local creditors are paid out of local assets if sufficient. Appropriate securities, charges and costs are also to be borne in such a case. [Ex parte Steyn 1979 (2) SA 309 (O), Ex parte Gettliffe: In re Dominion Reefs (Klerksdorp) Ltd (in liquidation) 1965 (4) SA 75 (T)

Question 2.2 [maximum 6 marks]

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

Common law principles will apply to the recognition of foreign judgments by a South African court, except that of Namibia. The foreign judgment not directly enforceable in South Africa but establishes a course of action will be enforced by South African courts if the following common law requirements are met:

- (i) The foreign court must have had international competence as determined by South African law
 - (ii) The judgment must be final and conclusive
 - (iii) The enforcement of the foreign judgment must not be contrary to South African public policy or the concept of natural justice
 - (iv) The judgment must not have been obtained fraudulently
 - (v) The judgment must not involve the enforcement of a penal or revenue law of the foreign state
 - (vi) Enforcement must not be prohibited by the Protection of Business Act 99 of 1978
- The South African court will also take into account the principles of comity that exists between the states and whether it is just and equitable to recognise a 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.

Discussion should have included that the liquidator may choose whether to abide by or repudiate the contract; 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

Once the liquidation against Mr. Big Deal is commenced, the business of Mr. Big Deal will no longer continue. While Mr. L may have a relationship with Mr. Big Deal, there is no provision for automatic conversion of liquidation proceedings into business rescue. If liquidation proceedings have already commenced at the time that a business rescue application has been brought to court, the business rescue application will suspend the liquidation proceedings until the court has adjudicated on the application. [Section

136(4), Insolvency Act]. Based on the consent of the Master, the liquidator may terminate the lease with Mr. L to ensure that no further outstanding accounts accrue with the company changing the amount of debt that is owed by Mr. L.

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.

Alternative measures to personal bankruptcy / sequestration are available to a debtor (in this case Ms. A), who may apply to the magistrates court for an administration order. The debts for such an application must not exceed ZAR 50,000 – which for Ms. A could've been applicable if it was only a one month of default of 20750. Since this is not the case, and Ms. A total outstanding is ZAR 900,000, the formal sequestration process will have to be followed.

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Further discussion should have included the requirements to file for voluntary sequestration; discretion of the court to grant such an order; potential compulsory sequestration by Mr B and the requirements.

After an order for sequestration has been granted Ms. A could shorten her period of insolvency by attempting a compromise with the creditors in majority – at least three-fourths in both value and number of the total votes.

Ms. A can commence voluntary surrender – approach the court to surrender her estate for the benefits of the creditors. The bank can commence compulsory sequestration. The bank also has the option to negotiate a reorganisation of debt or mediate the dispute.

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.

On the initiation of a business rescue proceedings and the appointment of a business rescue practitioner, the various stakeholders involved in the process vis a vis the company, in the present fact scenario are impacted in the following manner:

- (i) Business rescue proceedings result in 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 position [Refer Guidance Text.] The business rescue practitioner or the court may grant permission to lift the moratorium in appropriate cases such as in the case of guarantee contracts

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

[Section 133 and *Hitachi Construction Machinery Southern Africa Co (Pty) Ltd v. Botes (205/2018)*]. The moratorium does not apply in (a) criminal proceedings against the company or any of its directors or officers (b) proceedings against the company by a regulatory authority in the execution of its duties (the authority may continue with the proceedings after written notification to the business rescue practitioner), (c) proceedings concerning any property or right over which the company exercises the powers of a trustee, (d) proceedings instituted as a set off against any claim made by the company itself in any legal proceedings. In *Cloete Murray NO & anr v. FirstRand Bank Ltd [2015] ZASCA 39*, it was held that the moratorium does not preclude a creditor from cancelling an executory contract after the debtor company has been placed in business rescue. Mr. A's proceedings can no longer continue unless the business rescue practitioner appointed is able to ascertain that the outcome of the litigation fits into recoveries and rescue possible for the company. As an unsecured creditor Mr. A's liability will have to become a part of the rescue plan and a proof of the same must be made available with the business rescue practitioner. It is important to note that only pre commencement claims are a part of the business rescue plan so there is remedy for Mr A. There is an absence of guidelines for the administration of claims in business rescue proceedings and this creates uncertainty [Section 147(1)(a)(ii)]. Despite objections from Mr. A, the business rescue plan may still proceeding and there is no judicial remedy to set aside the adoption of a business rescue plans given the existence of cramdown provisions. Mr. A may negotiate for a preference in the business rescue proposal.

- (ii) During the business rescue proceedings, employees of the company continue to be employed on the same terms and conditions as immediately 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 to labour laws. Ms. B should therefore be rest assured that her contract will continue.
- (iii) Mr. M's contract with the company falls within the definition of an essential contract. There are no provisions for the treatment of essential contracts. The position in relation to a landlord claim in a business rescue does not fall within financing or costs of business rescue proceedings and therefore is not a preferential claim. Presently the 2008 amendment to the Companies Act is in place which might treat a landlords claim at part with post commencement financing. [*South African Property Association v. Minister of Trade and Industry 2016 ZAGPPHC 1148*]. Mr. M may also negotiate for a preference in the business rescue proposal and will be paid on priority.
- (iv) The Companies Act 2008 provides that the process of business rescues involves a *plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities and equity*. The business rescue plan may expressly include a proposal, including the extent to which the company is released from the payment of its debt and the extent to which any debt is proposed to be converted to equity in the company or another company. Ms T's shareholding may be diluted as a consequence of the business rescue plan being approved. [S 128, 150]
- (v) If, in investigating the affairs of the company the business rescue practitioner finds evidence of failure by any director to perform any material obligation relating to the company, the business rescue practitioner may take any necessary steps to rectify the matter, and may direct the management to take appropriate steps. [Section 141(2)].

Under business rescue proceedings, directors of a company remain bound by the duty to disclose personal financial interests or those of a related person but are relieved from the duties of a director set out under the Companies Act 2008 provided he acts under the authority and instructions/ directions of the business practitioner. Mr. H

Commented [SL20]: Could have included a discussion on the ranking of salary claims

Commented [SL21]: Discussion on treatment of executory contracts; relevant case law

Commented [SL22]: Ms T's shareholding may also not be affected.

remains liable in respect of loss sustained by the company as a result of: (a) acting on behalf of the company despite knowing that he lacks authority, (b) acquiescing in the carrying on of 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 part 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 [Section 76, 77]. In the absence of liability based on the reorganisation, the role of the director will change or voted on as per the provisions of the law and Mr. H will be bound.

*** End of Assessment ***