



## SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

### SOUTH AFRICA

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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]

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Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

#### Question 1.1

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

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

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.)

The key difference between the governing law on moveable property and immovable property are the *lex domicilli* and *lex situs* principles, which means that moveable property is governed by the law of where the **natural person/the debtor** is situated (or if a company, the jurisdiction it was incorporated), and immovable is governed by the law of where the **asset** is situated.

When a **natural person** is deemed insolvent in South Africa, he is automatically divested of his movable assets anywhere in the world (and thus South Africa) however, it is strongly recommended, on legal principle, that a foreign liquidator seek recognition from the South African courts before dealing with assets based in South Africa as the foreign officeholder has no authority to deal with South African assets until recognition has been granted.

In *Ex Parte Stegmann*, base on the principles that South Africa does not have any bilateral or multilateral cross-bored insolvency treaty with any other jurisdiction, and is regulated

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merely by the principles of comity, convenience and equity, the South African high court is still entitled to recognise the appointment of a foreign representative. Granting recognition to deal with an insolvent's immovable property in SA to a foreign administrator is a matter for the local court's discretion. Judge Innes, in the case of *Ex Parte BZ Stegmann* accepted this and states "on the other hand, in the same court, acting from motives of comity or convenience, is equally justified in allowing the order of the judge of the domicile to operate within its jurisdiction, and in assisting the execution or enforcement of such order. The matter is entirely one for its own discretion".

This precedent was set following *Ex Parte Palmer* No: In Hahn.

### 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?

As there is no reciprocal enforcement of foreign commercial judgements, foreign judgements are generally enforced under common law (in specific cases the Enforcement of Foreign Civil Judgements Act 32 of 1988 but only applies to Namibia). Because of this, foreign judgements are not directly enforceable in South Africa but a course of action can be established which will be enforced by the South African courts is the following common law requirements are met:

- The foreign court must have had international competence as determined by South African Law (the court which pronounced the judgment had jurisdiction to entertain the case according to the principles recognised by our law with reference to the jurisdiction of foreign courts, explained further below);
- The judgement must be final and conclusive in its effect and has not become superannuated;
- The enforcement of the judgement must not be contrary to South African public policy or the concept of natural justice;
- The judgement must not have been obtained fraudulently;
- The judgement 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 Businesses Act 99 of 1978.

In *Richman v Ben-Tovim 2008 2 SA 283* it was determined that 'competence as determined by South African Law' meant that the defendant must be habitually resident, domiciled or presence in the area of jurisdiction of the foreign court at the time of the commencement of the action or they must have submitted to the jurisdiction of the foreign court. Prior to this in a case *Purser v Sale 2001 SA 445* it was stated that only if a defendant submitted the action and was domicile or resident with the foreign jurisdiction would the action be accepted (mere presence was not enough). It was said, in the *Richman* case that "There are compelling reasons why..., in this modern age, traditional grounds of international competence should be extended, within reason, to cater for itinerant international businessmen" (*par 9; per Zulman JA*). "Public policy would require the recognition by a South African court of a lawful judgment given by default by an English court where personal service in England had taken place" (*par 12; per Zulman JA*).

South African Courts will also consider the principles of comity between the states and whether it is just and equitable to recognise a judgement. Examples of this include recent unreported matters such as *Overseas Shipholding Group* and *OXL NV* where both cases recognised a foreign judgement based on considerations of South Africa's obligation of comity and the objectives of the Cross-Border Insolvency Act.

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

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**Question 3.1 [maximum 5 marks]**

Commented [SL17]: 5

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.

Firstly, if the tenant is insolvent, the landlord can claim for any rent owing in arrears under the hypothec principle as mentioned in section 84(1) of the insolvency act whereby if an asset was delivered to a debtor and within the transactions there is an instalment agreement, then the creditor of that property is given favour. This is a common law right upon all moveable property bought in to it, as well as crops raised by the tenant and this applies as long as the rent is owing. The landlord, however, must go to court if they would like to make attachment of property.

Moreover, a lease agreement is not automatically cancelled upon liquidation of Big Deal Limited's estate, however, the trustee of the creditor's estate must immediately cancel the lease by way of written notice within three months (after which it is automatically cancelled). Mr L could claim against the Big Deal Limited for damages they he has sustained as a result of the cancellation, but must also claim for hypothec, as mentioned above. The Mr. L, if Big Deal Limited did not keep up with the payments following the commencement of financial difficulties, has not been paid, he is entitled to up to 3 months' rent in arrears.

As the Big Deals Limited does not appear to be in breach of their lease agreement at the time the liquidation commenced, Mr. L cannot cancel the lease, nor can he re-let the premises, until the liquidator (or trustee) has opted to cancel the lease. Any liquidator, as part of the liquidation process, should terminate the lease by Big Deal Limited with Mr. L prior to convening the general meeting.

In conclusion, then, it is likely that the lease agreement will be cancelled within 3 months of the commencement of the liquidation, but Mr. L can claim by way of hypothec any rent unpaid for up to three months and any damages caused by cancellation of the lease agreement.

**Question 3.2 [maximum 10 marks]**

Commented [SL18]: 10

Well-structured answer!

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.

Firstly, let's put Ms A's total amounts outstanding together with her underlying assets as she would have always had the cash flow issue, regardless of the decrease in value of the assets:

Asset	Year Purchased	Value	Original Value	Reason for decrease
Apartment in Cape Town	2018	750,000.00	1,200,000.00	Plumbing damage due to local municipality
Toyota Yaris	2019	60,000.00	120,000.00	Hail storm
<b>Liabilities</b>				
Apartment - ABC Bank	2018	800,000.00	1,200,000.00	Monthly payments
Toyota Yaris - Harry's Cars and Motorbikes	2019	70,000.00	120,000.00	Monthly payments

Net Liabilities

- 60,000.00 -

It is clear to see that Ms. A is insolvent in terms of cash flow, and in terms of her asset-liability ratio.

There are two options available to Ms. A; the first is to attempt to enter voluntary bankruptcy proceedings of which there is no threshold to the insolvency, however, she must prove that:

1. There will be sufficient free residue to cover the costs of the sequestration;

At the moment, surrendering her estate (assuming she has no other assets) would leave the debtors short of ZAR60,000 and she would not have sufficient residue to settle the liquidators fees.

2. That sequestration *will* be to the advantage of the creditors ("yield at the least, not a negligible dividend").

The onus on proving benefit in a voluntary sequestration is less strict than compulsory as it only requires a likelihood of benefit.

There is no obligation for Ms. A to enter bankruptcy proceedings, and if the above conditions are not met, then the court has discretion as to whether to grant the commencement of the proceedings, and sometimes, even if Ms. had complied with all the necessary requirements.

The second option is that the creditors apply for compulsory sequestration. In this circumstance, both Harry's Garage and ABC Bank account apply on the basis that the following conditions are met:

- Each have a claim of ZAR100 each, or ZAR200 combined; and
- There is reason to *believe* that the sequestration will be to the advantage of the creditors.

In a compulsory sequestration, it is necessary to prove that there is a prospect which is not too remote, that there will be a benefit.

If successful, Ms. A will be divested in all her assets, which vest with the Master and further, the trustee. She will be placed under certain restrictions but none really apply to her as she is not a contractor, not a trades-person, is unlikely to hold office nor defend a legal action (unless she is suing the municipal for not maintaining the property, or undergoing proceedings with the insurers of her vehicle for the damage caused by the hail storm).

Alternatives to formal sequestration are as follows:

- Applying to magistrates court, which requires a debt of only ZAR50,000. Ms. A's debt exceeds this, so she cannot apply.
- Statutory compromise; after the order for sequestration is granted, Ms A could shorten the period of her insolvency by applying for compromise. For example, if she could reduce one of her monthly payments by ZAR750, meaning that whilst she is "balance sheet insolvent" she could pay off all of her liabilities over a longer period, which would be favourable for the creditors as opposed to receiving a percentage of their claimed.

As such, it would seem preferable that the creditors apply to court for compulsory sequestration of Ms. A's estate, and subsequent to that, they come to a statutory compromise so that Ms. A can continue to pay back the amounts, but over a longer term.

The bank may also prefer this option, given that securing the asset will leave them with ZAR50,000 deficit and up until now, Mrs. A has been a 'good payer'.

More information is really required on this question; for example, neither of these decreases in value were Mrs. A's fault, and one would have thought that sufficient insurance would be required over a vehicle, and over a property. Ms. A should seek to contact her insurers regarding her car, and the municipal to compensate of for the value loss on her property which would put her in a favourable financial position.

**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.

Memorandum

**Introduction**

The business rescue of i-Orchard (Pty) Ltd (the "company") falls under the Companies Act 2008 (the "Act").

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

Mr. X will be a member in good standing of a legal, account or business management accredited by the Companies and Intellectual Properties Commission ("CIPC") or licensed as such by the CIPC. He will have full control over the Company's operations, and will need to decide whether there is a reasonable prospect of the Company being rescued. If the Company cannot be rescued, Mr. X will have to apply for the liquidation of the Company. Alternatively, if and when Mr. X decides that the Company is no longer under financial distress, he must inform the CIPC for termination of the proceedings.

The business rescue will have been initiated to facilitate the rehabilitation of the Company which is in financial distress as it appears that the Company will be unlikely to pay all of its debts as they fall due and ensure payment within six months, and moreover, is likely to become solvent in the next six months according to the directors. The exact definition of such is "Maximising the likelihood of the Company to so continue in existence, results in a better return for the Company's creditors or shareholders than would result from immediate liquidations of the Company" (*Idem s.128(b)iii*) as stated in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein*.

During business rescue proceedings, the claims of creditors rank in the following order of preference and will accordingly be paid out in this order –

1. practitioner's remuneration, expenses and claims arising out of the costs of the business rescue proceedings (section 135(1));
2. remuneration, reimbursement for expenses or other amounts of money relating to employment, due and payable by the company to an employee during business rescue (post-commencement finance);
3. the claims of secured lenders or creditors before business rescue. The Act is not clear about where those creditors should fall in the ranking of claims and this has given rise to some debate;
4. secured claims by post-commencement financiers, lenders or creditors in the order in which the claims were incurred (section 135(3)(a)(i));
5. claims in respect of the Insolvency Act 24 of 1936;
6. unsecured claims by post commencement financiers, lenders or creditors during business rescue in the order in which they were incurred (section 135(3)(b));
7. remuneration of employees which became due and payable before business rescue
8. commenced; and
9. unsecured claims of lenders or creditors before business rescue (section 135(3)(a)(ii))

#### Mr. A's Claim

Mr A falls under the scope of a pre-commencement claim. Mr. A must submit a proof of claim at the first meeting of creditors. He falls under ranking 9 stated above unless he is a secured creditor, in which case he will fall under ranking 3.

Mr. A will have an opportunity to consult Mr. X in the initial meeting of creditors, from which Mr. X will prepare a business rescue plan which will be published 25 days after the appointment of Mr. X, and Mr. A will have the opportunity to vote for or against this plan; but his vote will not alter his rights.

Such as business plan is binding by the Company, Mr. A (and other creditors) whether or not he chooses to attend the meeting or vote in favour of the plan.

#### Ms. B's Employment Contract

Commented [SL20]: Discussion of moratorium/stay

Commented [SL21]: Discussion ranking of salary claims

Ms. B will fall under ranking 2 for her time spent with the Company post-business-rescue, and rank 7 for her time prior.

Ms. B will continue to be employed on the same terms and conditions as immediately before the proceedings for business rescue commence, except insofar that changes occur in the ordinary course of attrition of different terms are agreed with Ms. B in accordance with applicable labour laws (ss 189 and 189A of the Labour Relations Act 66 of 1995).

Section 189 provides for fair dismissal on an employer's operational basis, whereas section 189A is more specific to large-scale retrenchments.

If Ms. B was going to be dismissed, the following factors would need to be considered:

**1) Consultation:**

Section 189(2) of the LRA states that the consulting parties must attempt to reach consensus on the following matters:

- The possibility of avoiding the dismissal i.e. alternatives to dismissal;
- Appropriate measures to minimise the dismissals;
- Measures to change the timing of the dismissals;
- Appropriate measures to mitigate the effects of retrenchment;
- The method for selecting the employees to be dismissed; and
- Severance Pay.

**2) Notification of Retrenchment**

Section 189 (3) of the LRA requires the Company to disclose in writing to the Ms. B or a union (where applicable) all relevant information including but not limited to:

- The reasons for the Retrenchment
- Alternatives to dismissal that were considered and the reasons why they were rejected
- The number of employees likely to be affected
- Proposed method of selection
- Severance pay
- Assistance that the employer will be offering
- Possibility of future re-employment

**3) Opportunity for feedback**

The Company must allow Ms. B the opportunity to make representations in relation to the proposed retrenchment, oral or written. If the employee makes representations in writing, the employer must respond in writing.

**4) Criteria for selection**

Section 189(7) of the LRA provides the Company may select employees to be retrenched according to the criteria they have agreed upon by the consulting parties. If no criteria have been agreed upon, that the selection must be fair and objective, the LIFO ("last in, first out") principal is often applied but is not the only principal.

**5) Notices of termination**

The Company must issue notices to the employees, who have been selected to be retrenched, after the consultation process has been completed.

#### 6) Severance pay

Mrs. B would be entitled to receive severance pay only if she was retrenched for operational requirements. The requirements regarding severance pay are set out in section 41 of the Basic Conditions of Employment Act ("BCEA"). Section 41 of the BCEA provides that the Company must pay Ms. B if she has been dismissed for operational requirements "severance pay equal to at least one week's remuneration for each completed year of service with that employer" (5 years for Mrs. B, so 5 weeks' pay).

#### 7) Payments

The Company must pay Mrs. B, if she is retrenched, the following payments:

- Severance pay;
- Any outstanding leave due (up to date of dismissal); and
- Notice pay (either in terms of the BCEA or as per employment contract).

#### Mr M's Lease Agreement

Executory contracts, such as a lease agreement that has not yet reach the end of it's term, are not automatically terminated upon appointment of Mr. X, however Mr. X may elect to entirely, partially or contractually suspend the obligations, or cancel the lease agreement after seeking a court order. Mr X is required to be proactive about this, and suspend any further obligations that would fall due during the proceedings, before they become due. Mr M must also cancel this contract.

Mr M's lease agreement is considered an "essential contract" which are not specifically provided for in the Act in terms of ranking. Mr M's rent falling due for the period rating to the business rescue proceedings is neither considered "financing" nor is it "costs of the business rescue proceedings" and is therefore not a preferential claim.

However, Mr. M may claim for any rent outstanding prior to the commencement of the business rescue.

There is a proposed amendment to the Act which is preferable for landlords whereby Mr M would be recognised under post-commencement financing, but this is not yet adopted.

Post commencement financing relates to financing obtained during business rescue. These are deemed as ranking 2 as stated above, as opposed to Mr. M being an unsecured creditor, ranking as 9 on the payment list.

#### Shareholdings

No changes will be made to shareholdings upon the commencement of the business rescue.

The commencement of the business rescue is, in the worst case scenario, to improve the Company's position to generate a better return if the Company enters in to liquidation.

#### Directors

Once Mr. X was appointed, Mr H ceased to have any power over the company except insofar the Mr. X may delegate powers and functions to him, he will be released from his

**Commented [SL22]:** Discussion of relevant case law

**Commented [SL23]:** Changes may take place in the ordinary course of business or by way of a court order or pursuant to an approved business rescue plan

duties as set out in section 76 of the Act and most of his liabilities as in section 77. Mr H, under section 77, will still be liable for the loss sustained by the Company as a result of:

- Acting on behalf of the Company despite knowing he lacks authority;
- 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 fraudulent purposes; and
- Being a party to an act or omission knowing that it is calculated to defraud a creditor, employee, or shareholder of the Company or that it has another fraudulent purpose.

Mr H will be bound to disclose personal financial interests or those of a related person.

Mr. X has complete management over the Company and effectively substitutes the board and may choose to remove or appoint who he wishes.

Upon the commencement of the business rescue proceedings, the company will be subject to a Moratorium whereby legal proceedings against the Company and any related property begin. Mr. X must apply to the court to have this moratorium lifted. This moratorium cannot be lifted against criminal proceedings against Mr H (if any).

Mr. X has an obligation to investigate the actions of the directors and moreover, failure of them complying with material responsibilities, which may have led to the failure of the Company.

**\* End of Assessment \***