



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

SOUTH AFRICA

Commented [SL1]: TOTAL = 21/50
42%

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]: 0

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

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

Question 1.3

Commented [SL5]: 1

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

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

Question 1.4

Commented [SL6]: 0

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

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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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

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 movable assets of a natural person involved in cross-border insolvency are governed by the laws of his domicile (lex domicilli). What this entails is that, a natural person declared insolvent and divested of his property by the law of his domicile is automatically divested throughout the world and consequently South Africa too. However, it is a matter of principle that the foreign representative must seek recognition before dealing with such property in South Africa.

Regarding movables of juristic persons, the place of incorporation usually substitutes the law of domicile but often, the principal place of business may provide for jurisdiction even if it is different from the place of incorporation. The representative of such a debtor has no authority over the assets in South Africa until after recognition of his appointment based on him proving that his claim is genuine.

Commented [SL12]: 1

Commented [SL13]: SUB-TOTAL = 8

Commented [SL14]: 2
Further discussion could have included that immovable property is governed by the law of the place where the immovable property is situated (lex situs).

Conversely, the sequestration of the immovable assets of an individual or juristic person outside South Africa does not divest such a person of the immovable assets in South Africa. The office holder seeking recognition to deal with such assets must apply to the High Court and the court shall grant a rule nisi to issue and publish the application for any interested persons to make objections. The court may however proceed without granting a rule nisi what is of essence is the protection of local debtors and payment of any statutory charges before repatriation of any excesses.]

Question 2.2 [maximum 6 marks]

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

[The enforcement of foreign judgement is not automatic in South Africa as specific common law requirements must be met. These requirements include:

1. The foreign court that issued the judgement must have had international competence over the matter
2. The judgement must have been a final and conclusive judgement
3. The enforcement of the judgement must not be contrary to South African public policy or concept of natural justice
4. The judgement must not have been obtained fraudulently
5. The judgement must not involve the application of penal or revenue laws of the foreign country
6. Its enforcement must be in line with The Business Promotion Act 99 of 1978]

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

Question 3.1 [maximum 5 marks]

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

[While the proposed amendment of section 135 of Companies Act 2008 remains pending, the landlord's position remains precarious in the insolvency process of his tenant. The present treatment of a landlord's claim for rents falling due in an insolvency proceeding is that, such rents neither constitute financing or cost of the rescue thus it those not fall amongst priority claims. Thus Mr L will only have to keep his fingers crossed and wait for any available free residue.]

Question 3.2 [maximum 10 marks]

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Commented [SL17]: 0

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

Commented [SL18]: 3

Further discussion should have included:

- Ms A is insolvent
- Ms A can apply to the High Court for voluntary sequestration
- She will have to prove the following (no threshold):
 - Sufficient free residue (immovable property is subject to a mortgage bond and should not be included in calculating the free residue);
 - Will be advantage to creditors – not negligible dividend
- The court still has a discretion to grant the order, even if Ms A complies with all formalities and requirements. Students may include a brief mention of factors that may have an influence on the court's discretion in this regard

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 a situation of over indebtedness due to credit granted for the purchase of movables and immovables. In this situation, she can apply for a debt review which may result in a newly formulated repayment plan that would give her some breathing space. Another option would be to enter into a common law compromise (voluntary agreement) with her creditors. This second option however necessitates the participation of all of her creditors for it to be of practical value.

The bank on the other hand can apply for a compulsory sequestration of Ms A's assets since the amount of its claim surpasses the statutory threshold of at least ZAR 100 but is this going to be the best outcome for creditors? Taking into consideration all other statutory charges on a debtor's assets, the bank may not be able to gain as much as it would if they rather resolve to debt review with the debtor.]

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.

[LEGAL MEMO

To:

1. Mr. A
2. Ms B
3. Mr M
4. Ms T
5. Mr H

Subject matter: I- Orchard Business Rescue

I-Orchard (Pty) Ltd has officially entered business rescue and a business rescue practitioner in the person of Mr. X has been appointed to oversee the process. This process entails significant modifications in the relationship that exists between I-Orchard and different stakeholders involved in business with I-Orchard. It is therefore, the goal of this memo to opine on such modifications.

Commented [SL19]: 6

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

It should be noted that business rescue proceedings result in a moratorium on legal proceedings against a company and as such any proceedings against I-Orchard shall be stayed. However, a distinction is made between pre – commencement and post commencement proceedings. This means that any proceeding or claim that was initiated before the official entry into rescue, will be considered in the rescue package.

Employment contracts will still remain binding but the company can make adjustments in the normal course of business with any employee on the terms of the employment **contract**.

Lease contracts are treated as **executory contracts** but unfortunately, the current statutory provisions do not consider lease claims to be preferential.

The **rights** of shareholder will remain unaffected by the rescue proceedings except the courts order otherwise.

The rescue practitioner will take over the role of Director and will be habilitated to investigate any corporate mal-practice that might have been carried out by the outgoing Director.

*** End of Assessment ***

Commented [SL20]: Ranking of claims - salary

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

Commented [SL22]: May also be affected by the plan