



TOTAL: 42/50 = 84%  
Very good paper!

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

SOUTH AFRICA

***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: [studentID.assessment7D]. An example would be something along the following lines: 202223-336.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 "studentID" 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 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. 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 9 pages.**



**ANSWER ALL THE QUESTIONS**

QUESTION 1 (multiple-choice questions) [10 marks in total] [10/10 marks]

**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

**Choose the correct statement in relation to the insolvent debtor and rehabilitation (discharge):**

- (a) If no claims have been received against the estate within six months of the date of sequestration, the debtor is automatically rehabilitated.**
- (b) Once a period of 10 years has lapsed after the sequestration of his estate, the debtor may apply to court for an order of rehabilitation.**
- (c) If the Master has approved a plan of distribution to repay all of the claims against the estate as well as all costs in full, the debtor may apply to the court for rehabilitation.**

**(d) None of the above are correct.**

Question 1.2

**Choose the incorrect statement/s in relation to the recognition of a foreign officeholder:**

- (i) The foreign officeholder must apply to the Magistrate's Court for recognition.**
- (ii) In the court order the court will include provisions to protect local creditors.**
- (iii) The court order must be published in the Government Gazette.**
- (iv) The foreign officeholder will only be required to provide appropriate security, and nothing more.**

**Choose the correct answer:**

- (a) Option (ii).**

- (b) Options (ii) and (iv).**
- (c) Option (iii).**

**(d) Options (i) and (iv).**

Question 1.3

Choose the correct statement:

- (a) In terms of section 83(1) of the Insolvency Act 24 of 1936, a creditor who holds immovable property as security for his claim is required to give written notice of this fact before the first meeting of creditors to the Master and to the trustee.**
- (b) In terms of section 83(1) of the Insolvency Act 24 of 1936, a creditor who holds movable property as security for his claim is required to give written notice of this fact before the first meeting of creditors to the Master and to the trustee.**
- (c) In terms of section 83(1) of the Insolvency Act 24 of 1936, a creditor who holds immovable property as security for his claim is required to give written notice of this fact before the second meeting of creditors to the Master and to the trustee.**
- (d) In terms of section 83(1) of the Insolvency Act 24 of 1936, a creditor who holds movable property as security for his claim is required to give written notice of this fact before the second meeting of creditors to the Master and to the trustee.**

Question 1.4

**Which of the following factors may persuade the court in exercising its discretion whether to recognise foreign proceedings:**

- (i) That it is equitable and convenient if the insolvent is resident outside of South Africa.**
- (ii) Assets in South Africa are not a prerequisite for recognition.**
- (iii) Preference for single proceeding directed by court of domicile.**
- (iv) If the order was granted by the court of domicile and the insolvent has movables only it is a mere formality, but for immovable property the court will apply its discretion.**

Choose the correct answer:

- (a) Option (i).**

**(b) Options (ii) and (iii).**

**(c) Options (i), (ii) and (iii).**

**(d) All of the above.**

Question 1.5

**In March 2022 Company XYZ was placed in liquidation. The liquidator of Company XYZ became aware of the fact that Company XYZ disposed of property worth ZAR 22,000 to Company ABC for an amount of ZAR 15,000 during October 2021. Directly after the disposition, Company XYZ's liabilities exceeded its assets by ZAR 5,000. If the disposition is set aside -**

**(a) Company ABC will be required to return ZAR 22,000 to the liquidator of Company XYZ.**

**(b) Company ABC will be required to return ZAR 15,000 to the liquidator of Company XYZ.**

**(c) Company ABC will be required to return ZAR 5,000 to the liquidator of Company XYZ.**

**(d) Company ABC will be required to return ZAR 7,000 to the liquidator of Company XYZ.**

Question 1.6

**Choose the correct statement:**

**(a) In respect of a general notarial bond over the movable property of the debtor, a creditor in whose favour the bond has been registered will have a secured claim in terms of the Insolvency Act 24 of 1936 upon the sequestration of the debtor's estate.**

**(b) In respect of a general notarial bond over the immovable property of the debtor, a creditor in whose favour the bond has been registered will have a secured claim in terms of the Insolvency Act 24 of 1936 upon the sequestration of the debtor's estate.**

**(c) In respect of a special notarial bond over the movable property of the debtor, a creditor in whose favour the bond has been registered will have a secured claim in terms of the Insolvency Act 24 of 1936 upon the sequestration of the debtor's estate.**

**(d) In respect of a special notarial bond over the immovable property of the debtor, a creditor in whose favour the bond has been registered will have a secured claim in terms of the Insolvency Act 24 of 1936 upon the sequestration of the debtor's estate.**

Question 1.7

**A cause of action established by a foreign judgment can be enforced if certain common law requirements are met. Which of the following is not such a common law requirement:**

**(a) The foreign court must have had international competence as determined by South African law.**

**(b) The enforcement of the judgment must not be contrary to South African public policy or the concept of natural justice, but the judgment need not be final and conclusive.**

**(c) The enforcement of the judgment must not be contrary to South African public policy or the concept of natural justice.**

**(d) The judgment must not have been obtained fraudulently.**

Question 1.8

**Cluck Company Limited (the company) wishes to obtain funding in order to expand its poultry and egg enterprises. As part of the security package negotiated with the lender, the lender requires that the company provide its tractors and incubators to it as security. The company makes use of the tractors and incubators on a daily basis. This form of security required is a:**

**(a) Pledge.**

**(b) Hypothec.**

**(c) Cession in security of a debt (*in securitatem debiti*).**

**(d) Special notarial bond.**



Question 1.9

**Which of the following is / are 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 1.10

**In accordance with the South African common law dealing with cross-border insolvency, the assets of an insolvent are governed as follows:**

- (a) Movable property is governed by the law of the natural person's domicile (*lex domicilii*).**
- (b) Movable property is governed by the law of the natural person's domicile (*lex situs*).**
- (c) Immovable property is governed by the law of the place where the immovable property is situated (*lex domicilii*).**
- (d) Immovable property is governed by the law of law of the natural person's domicile (*lex situs*).**

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

Question 2.1 [maximum 3 marks] [3]

**List any three proceedings that are excluded from the moratorium under business rescue proceedings imposed by section 133 of the Companies Act 71 of 2008.**

[

**The moratorium does not apply to the following proceedings:**

- 1. Proceedings concerning any property or right over any property that is in the possession of the company and over which the only company has a right of use or exercises powers over.**

2. *Proceedings by a regulatory authority in execution of its duties against the company.*
3. *Criminal proceedings against the company or any of its directors.*
4. *Legal proceedings involving set-offs against claims made by the company itself.*

]

Question 2.2 [maximum 5 marks] [5]

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

- (a) **Costs of sequestration;**
- (b) **Funeral expenses;**
- (c) **Income tax;**
- (d) **Claim secured by a general bond;**
- (e) **Employee's claims.**

[

**The order of preference for claims would be as follows:**

1. **Funeral expenses**
2. **Costs of sequestration**
3. **Employee's claims**
4. **Income tax**
5. **Claim secured by a general bond**

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Question 2.3 [maximum 2 marks] [1]

**Below is an extract from the business rescue plan of Mapochs Mine Proprietary Limited (Mapochs), a South African mining company that was placed under business rescue on 20 April 2015.**

EVENT	DATE
Board Resolution to commence Business Rescue filed at the CIPC	20 April 2015
BRPs appointed	21 April 2015
First Employees' Meeting	28 April 2015
First Creditors' Meeting	6 May 2015

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First Creditors' Committee Meeting	26 May 2015
First Employees' Committee Meeting	7 October 2015

**With reference to the above extract, how and by whom would the joint business rescue practitioners (referred to in the extract above as "BRPs") have been appointed?**

[  
*If the company's board of directors resolves to place the company into business rescue, they can appoint a BRP at the same meeting on 20 April 2015.*

*This appointment is subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors on 6 May 2015. (Companies Act 71 of 2008)*

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- *In the board resolution placing the company under business rescue.*

QUESTION 3 (essay-type question) [15 marks] [13] Very good answer

**Chances are that when an insolvent company is placed under liquidation proceedings it is party to an **executory contract**. Write an essay on the **treatment of executory contracts** under liquidation proceedings, **including any exceptions** to the general rule. Your essay should include a brief discussion of any exceptions that may apply.**

[  
*When a company enters into liquidation proceedings, it may be a party to an executory contract. An executory contract is one where obligations remain to be fulfilled by one or more parties involved. Liquidation proceedings can affect the outcomes and treatment of these contracts.*

*South African legislation does not contain provision for the treatment of executory contracts in insolvency. Hence it will be treated by common law [1]principles of law of contract which have been adjusted to insolvency.*

*If a debtors estate is under sequestration, this will not terminate any contract to which he is a party to.[1] The trustee of the insolvent estate has the power to elect whether to abide [1]by an executory contract or to cancel[1] it. The trustee is afforded this power so that he may act in the best interests of the [1]creditors. It allows for the*

*flexibility required in insolvency cases, with the trustee being able to assess each case individually*

*In making this decision, the trustee will consider the financial impact of each option for the insolvent estate and will aim to maximise the financial returns to creditors. The trustee must therefore obtain the creditors instructions before making any of these decisions. If the trustee decides to stand by the contract, the insolvent estate is required to fulfil all remaining obligations under the contract[1]. If the trustee elects to cancel the contract, any damages resulting from the cancellation become a claim against the insolvent estate. [1]Note the claim is from clauses due to breach of contract and not claims based on performance of the contract if it was not cancelled. [1]*

- **Once the liquidator has exercised this election right he cannot change his mind***

*However, there are exceptions to the rules mentioned above. In some cases, despite the liquidation proceedings, the executory contract may continue to be in effect. See some exceptions below:*

*Exception: Employment contracts: [1]Upon the commencement of liquidation proceedings, employment contracts are suspended. Unless otherwise agreed with trustee, all of these contracts will come to an end 45 days from date of the trustees appointment.*

*Exception: Lease agreements. [1]Even though the insolvent estate is no longer able to occupy the leased premises, the lease agreement does not automatically terminate, and the landlord will still have a claim for damages and the lessor obtains hypothec over immovable property brought into the land property for any rent that is due. If the lease is not cancelled within three months after the trustee's appointment, the lease is deemed to be cancelled automatically.*

*Exception: Sales Instalment agreements: [1]If a purchaser's estate is sequestrated and the said purchaser is under a sales instalment agreement for movable property. Then the seller will obtain a hypothec over the goods subject to this agreement when amounts are still owed by the purchaser. Sequestration will thus cause ownership of the goods to pass to the insolvent estate*

*Exception: Cash sales contract: [1]In a situation where someone buys movable goods, and receives them, but then becomes insolvent before completing the payment, the original owner of the goods can take action to reclaim them. This action needs to occur within 10 days of delivering the goods. The seller must issue a written notification to the person who purchased the goods, the trustee, or to the Master of the High Court.*

*Exception: Sale of immovable property contract: [1]*

*Where a person sells real estate but then goes bankrupt before the property's ownership can be transferred, the buyer gets certain protections under the Alienation of Land Act 68 of 1981 in South Africa. If the buyer fulfils multiple conditions, the trustee must allow the transfer of property to proceed, which overrules the usual trustee's power to decide whether to proceed or cancel the contract.*

*There are conditions for this provision to apply are: the purchase price must be paid in at least two parts; the property is meant for residential use; the property is capable of being officially recorded in the Deeds Office; the contract has been recorded in the Deeds Office by adding a note against the property's title deed; and all the costs related to transferring the property and some other related expenses have been paid.*

*If the person buying the property goes insolvent before the transfer can take place, the trustee has the option to decide whether to enforce or terminate the contract. If the other party requests it in writing, the trustee must make this decision within a period of six weeks. If the trustee doesn't do so, the other party can ask the court to cancel the contract and ask for compensation.*

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QUESTION 4 (fact-based application-type question) [15 marks]- [10] Good answer, however more information was required

**The directors of ABC (Pty) Ltd (the company) foresee the reasonable likelihood that the company will, within the next six 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). Donovan Jones 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:**

- (a) Charlie White, a successful businessman, lent the company ZAR 500 000 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. Charlie is unsure what the effect of business rescue will be on the money owed to him.**
- (b) Rowena Gonzales has worked for the company for the last five years and she is concerned about the effect that business rescue will have on her employment contract.**
- (c) Mario Miles 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.**
- (d) Trudy Pather 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.**

(e) Henry Jean 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 that the company has been placed under business rescue. 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 business rescue practitioner needs to take cognisance of.**

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Memo

**Subject: Legal Aspects and Potential Outcomes of Business Rescue Proceedings**

**To: Charlie White, Rowena Gonzales, Mario Miles, Trudy Pather, and Henry Jean**

**Date: XXX July 2023**

**From: 202122-438**

*I am writing in response regarding your questions about the business rescue proceedings of ABC (Pty) Ltd.*

Charlie White:

*As a creditor, business rescue proceedings ("BRP") will temporarily put a hold on your legal proceedings against the company due to the moratorium under Section 133 of the Companies Act. The company's debt to you will be dealt with as part of the business rescue plan. You will have the right to vote on this plan when it is proposed. Please note that the business rescue practitioner or the court may grant permission to lift this moratorium in appropriate cases but there does not appear to be such a case in this instance. **o Claim to be proved at first meeting of creditors***

Rowena Gonzales:

*Your employment contract will remain in effect during the business rescue proceedings, as Section 136(1)(a) of the Companies Act protects employees in this situation. It should be noted that the business rescue practitioner may change your terms of employment, but these are subject to the Labour Relations Act 66 of 1995. Please also not employer remuneration is high on priority list of payments if ABC (Pty) Ltd obtain financing during the BRP.*

Mario Miles:

*As a lessor, your lease agreement with the company remains in effect during the business rescue proceedings, subject to any alterations or cancellations under Section 136(2) by the business rescue practitioner.*

- *Mario may also cancel the agreement (Murry Cloete); may not cancel if practitioner has elected to suspend (Kythera); but in terms of reciprocity principle other court said may cancel (BP Southern Africa).*
- *No concursus creditorum.*
- *Practitioner needs to make a decision as the treatment of contracts need to be included in the business rescue plan*
- *This is not an essential contract - there are no such contracts in business rescue*
- *Claim to be proved at first meeting of creditors*
- *Current position: The current position is that the landlord's claim for rent falling due in business rescue (based on an executory lease agreement) is neither "financing" nor is it "costs of the business rescue proceedings" and is therefore not a preferential claim (mention potential amendment to Companies Act 2008 in this regard)*

Trudy Pather:

*As a shareholder, you retain your shares during business rescue proceedings. However, the rights of your shares might be affected by the adopted business rescue plan.*

- *If the business rescue plan does alter the rights of any class of holders of the company's securities, the holders of these securities are called to a vote where the majority of the holders of the voting interest can approve the plan*

Henry Jean:

*As a director, your role is not affected during business rescue proceedings, but your powers may be limited under Section 140(1)(a) of the Companies Act as the business rescue practitioner takes full management control over the company while the proceedings are ongoing.*

*The business rescue practitioner should consider all obligations, contracts, and assets of the company in order to draft a rescue plan that is both fair for all parties involved. The goal is to maximise the chances of the company returning to a profitable state of operation while balancing the interests of creditors, employees, lessors, shareholders, and directors.*

- *These are all affected persons*
- *Rights may be affected in terms of the business rescue plan*
- *In respect of approval of the business rescue plan - any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined on the request*

*of the practitioner to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated*

- *Cram-down - bound by majority vote*

*Please do not hesitate to contact me should you have any questions.*

*Kind regards,*

**202122-438**  
**Lawyer of SA**

*]*

**\* End of Assessment \***