



TOTAL: 35.5/50 = 71%
Good effort!

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] [9/10 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.

[a) Criminal proceedings against the company or any of its directors.

b) Proceedings against the company by a regulatory authority.

c) Proceedings concerning any property right over which the company exercises the powers of a trustee]

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.

[(a) Funeral expenses;

(b) Costs of sequestration;

(c) Employee's claims

(d) Income tax;

(e) Claim secured by a general bond]

Question 2.3 [maximum 2 marks] **[1.5]**

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
First Creditors' Committee Meeting	26 May 2015
First Employees' Committee Meeting	7 October 2015
Second Creditors' Committee Meeting	15 October 2015
Third Creditors' Committee Meeting	10 November 2015
Business Rescue Plan published	20 November 2015
Meeting to consider the Business Rescue Plan (in terms of section 151 of the Companies Act)	30 November 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?

[Section 129 of the Companies Act of 2008 permits the board of a company to voluntarily commence rescue proceedings and place the company under supervision. The board is permitted to do so if it reasonable believes that the company is financially distressed and there appears to be a reasonable prospect of rescuing the company (s.

129(1(a) and (b). In this case the resolution was filed with the CIPC on 20th April 2015. This was the first step as required by the law.

The Company is required to file a notice of the resolution and to appoint a business rescue practitioner within 5 days of filing the resolution (s. 129(3)(a) and (b). Therefore, the appointment of BRPs on 21st April 2015 was within the prescribed time frame.

The company must ensure that the appointed BRPs comply with the qualification requirements of s. 138 such as good professional standing and should not a relationship with the company that would put his or her integrity, impartiality and objectivity into question.

The BRPs are required by s. 129(2)(b) to consent to the appointment in writing.

The company is further required by s. 129(4) to file a notice of the appointment of the BRPs within 2 business days after making the appointment. In this case, this would be by the 23rd of April 2015 and to file a copy of the notice with each affected person within 5 business days of filing the notice. In this case, this would be by the 28th of April 2015.

Therefore, as per the above extract, the BRPs will be appointed by the company in the manner described above. Section 139(1)(a)(i) provides that the business rescue proceedings commence when the company files the resolution in accordance with s. 129(3).]

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

QUESTION 3 (essay-type question) [15 marks] [6]

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.

[Insolvency law in South Africa does not specifically provide for the treatment of executory contracts [1] and therefore rules of common law [1] apply to the treatment of executory contracts in liquidation. Executory contracts are defined as contracts in which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other (Vern Countryman, 1973).

Liquidation proceedings do not automatically terminate executory contracts [1] and neither is the liquidator obliged to assume them. The decision of the liquidator will be

guided by various considerations. Executory contracts may be both an assets and a liability. Therefore, it is important to determine the net position of the executry contract in relation to the insolvent company, that is whether it is a net asset or net liability (Baird et al., 2001). *This will aid the determination by the liquidator as to whether to assume [1]or reject [1]the contract.*

*A liquidator should carefully consider the impact of assumption or rejection of an executory contract on the general body of creditors. **Upon instruction of the creditors.** For example, the liquidator may assume an executory contract that is a net asset or reject it if it is a net liability. The decision to either assume or reject an executory contract has implications. Where the liquidator assumes the contract, any costs associated with the performance of he contract, have the status of administrative expenses in the liquidation* (Montelindo Compania Naviera SA v Bank of Lisbon and SA Ltd 1969 (2) SA 127). *Where the liquidator rejects the contract, the other party is entitled to assume breach of contract and is entitled to damages. [1]*

Therefore, in situations of insolvency including liquidation, common law principles apply. Executory contracts are treated variously under different insolvency proceedings. However, in situations where a company is placed under liquidation, the automatic stay principle and section 353(1) of the Companies Act of 1973 only permits the company to continue business that is necessary for its beneficial winding up. Therefore, executory contracts are deemed rejected.]

The five exceptions not discussed.

QUESTION 4 (fact-based application-type question) [15 marks] [11]

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.

[a]The court proceedings initiated by Charlie White against ABC (Pty) Ltd or for the ZAR 5000, 000 he had lent the company will be subject to a moratorium in accordance with s. 133(1) of the Companies Act which prohibits commencement or proceeding with any legal or enforcement action against a company. The proceedings are not within the exceptions provided for in s. 133(1) (a)-(e). Charlie White is an unsecured creditor and therefore an affected person in the business rescue proceeding with rights as provided for in s.145 of the Act that include a right to receive notices concerning the business rescue proceedings, to form a creditor's committee and to vote on the plan.

Prove claim at first meeting

b) Rowena's employment contract is protected by section 136 of the Companies Act and therefore her terms and conditions of employment remain unchanged and any changes or retrenchment are subject to the relevant laws. In addition, Rowena is an affected person within the meaning of s. 144 of the Act and therefore, if she has any claim in relation to her employment contract prior to the commencement of business rescue proceedings, the claims have preferential creditor status. As an employee, she is an affected person and has a right to receive notices and participate in the business rescue proceedings either directly or through her trade union and to vote on the plan.

The employees and the practitioner may agree upon different terms and conditions in accordance with applicable; ranking

c) The lease agreement with Mario Miles is subject to the provisions of s. 136 (2)(3) wherein the Business Rescue Practitioner is entitled to cancel or suspend partially or conditionally any provision of an agreement and Miles will be entitled to assert a claim

against the company for damages. In addition, if there are any amounts owing to Mario in relation to the lease agreement and owed prior to the commencement of the business rescue proceedings, he will have a claim against the company and entitled to participate in the proceedings as a creditor under s. 145. **Ranking; case law discussion; not an "essential" contract**

d) Business rescue proceedings are not winding up or liquidation proceedings. Therefore, Trudy Path will not lose her shareholding but will be impacted by the process. S. 137 provides for effect of business rescue proceedings on shareholders. It invalidates any alteration in the status or classification of any issued securities other than transfer in the ordinary course of business. In addition, she is an affected person and entitled to participate in the proceedings by virtue of s. 146 including receiving notices, participating in court proceedings and voting on the plan. The plan may impact the holders of various securities. However, the nature and extent of that impact would have to be fully explained in the plan as required by s. 150.

e) Henry Jean will continue to serve as director with modifications to the duties and liabilities of a director, but bound by the fiduciary duties, subject to the following:

- i) exercise functions subject to the authority, instruction and direction of the business rescue practitioners;
- ii) provide information to the business rescue practitioner as required;
- iii) act on behalf of the company with the approval of the business rescue practitioner;
- iv) must cooperate with and assist the practitioner as required by s. 142;
- v) may be removed if they engage in acts or omissions that impede the work of the business rescue practitioner.]

Further considerations: binding offers; cram-down

* End of Assessment *