



TOTAL: 32.5/50 = 65%

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] [1]

**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.**

*Section 133 of the Companies Act 71 of 2008 (the Act) explicitly provides that no legal action may be instituted against a company under business rescue (moratorium). The purpose of the period granted is to give the company some breathing space from "legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession."*

*Though the legal proceedings against a company under rescue are seized under moratorium, there are exceptions.*

*For instance, under section 133 (1) (a), a legal action can be brought against the company or a legal action enforced against a company under rescue if the IP consents in writing to same. Once a person obtains such a consent, the person with the consent can institute a legal action, against a company under rescue “in any forum”.*

*Another exception is where “with the leave of the court and in accordance with the terms the courts considers suitable” commence and or enforce a legal action against the company anywhere.(section 133(1) (b).*

*Where the legal proceeding against the company is a ‘criminal proceeding against the company or any of its directors or officers’ the person can commence the action in any court without the consent of the court or IP or anyone for that matter. [1]*

- proceedings against the company by a regulatory authority in the execution of its duties (the authority may continue with the proceedings after written notification to the business rescue practitioner);*
- proceedings concerning any property or right over which the company exercises the powers of a trustee; and*
- proceedings instituted as a set-off against any claim made by the company itself in any legal proceedings.*

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.**

*Generally, creditors are characterized as follows; secured or unsecured. Under the unsecured creditors, we have preferential and concurrent creditors. A secured creditor is one who holds security over an asset or assets of the insolvent company. A secured creditor’s claim is therefore paid by way of disposing or selling the property that secured the claim.*

*On the other hand, an unsecured creditor does not have any asset securing the claim. Thus, payments made to unsecured creditors are made out of what is left after all secured creditors are paid. As noted above, within the unsecured creditors, we have two types of creditors; preferential and concurrent creditors. Per section 2 of the Insolvency Act a preferential creditor is a creditor who though did not secure his claim before the company became insolvent, has priority among the pool of unsecured creditors. These preferential creditors have priority over other unsecured creditors when it comes to payment.*

*Concurrent creditors also do not have any security to cover their claims. However, in their case they are not given any priority. They are paid out of the "free residue" or the balance of the unclaimed amounts of the insolvent company. These creditors are not given preferential treatment when it comes to payment. These creditors rely on the remainder of the free residue in the insolvent company after all payment of all secured and preferent creditors and costs have been paid.*

*Section 2 of the Insolvency Act defines "free residue" to mean "that portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention".*

*As has been noted above, a creditor at the point of payment is paid either from what they secured before the company became insolvent or from the residue of what is left after all secured claims have been paid. After all payments have been paid, the following cost/claims are paid from what remains in the following order of preference;*

- a. The first costs/claims in the free residue account in order of preference is funeral expenses. Section 96 (1) states that, "any free residue of an insolvent estate shall be applied in the first place in defraying the expenses of the funeral of the insolvent, if he died before the trustee's plan of distribution was submitted to the Master." In addition to this, the funeral expenses of the "wife or minor child" shall also be paid out of the free residue of the insolvent estate if "those expenses were incurred within three months immediately preceding the sequestration of the insolvent's estate". The amount anticipated to be paid for these expenses should not ZAR 300 in total.*
- b. The second costs to be paid from the "free residue" account is the cost of sequestration. The cost of sequestration is paid in the following order; sheriff's charges arising since the sequestration, fees to be paid to the Master and other costs listed under section 97(2) (c). Section 97 expressly excludes "costs to which securities are subject" under section 89 (1).*
- c. Employee claims is the next to be catered for from the free residue account. Section 98 (A) of the Insolvency Act states that the balance of the free residue shall be used to pay the salaries or wages of employees of the insolvent. It is noted that this section does not only cater for salaries or wages but also any contribution which were payable in respect of the employee's employment:*
- d. After the above payments, any residue on the account is applied to Income tax. Section 101 of the Insolvency Act supports the point that the residue is applied is the next in line to be paid from the residue account.*

- e. *From the list provided, claims secured by a general bond is the last to be paid out of the free residue account as per section 102 of the Insolvency Act. It is noted that a general bond does not in any way provide security to one's claims. Thus, it does not fall within the "special mortgage" as provided under section 2 of the Insolvency Act. This implies a person's whose claim is based on this bond does not have preference in the pool of unsecured creditors.*

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 2008 (the Act) allows for the Company to take the decision to "voluntarily begin business rescue proceedings" if it appears to the board that the Company is "financially distressed" and if the board has reasonable grounds to believe that the Company can be rescued or made solvent. The decision of the Board to begin the rescue process is made by way of a resolution of the Board.*

*Section 129 (3) of the Act states that after a company has adopted and filed the resolution of the Board which began the rescue process, the company must "appoint a business rescue practitioner". The caveat is that the practitioner so appointed must meet the requirements under section 138 of the Act. In addition, the practitioners must also consent to their appointment in writing.*

*After appointing the business practitioners, the company must under section 129 (4), "file a notice of the appointment of" the practitioners in two business days after the*

*appointment was made and further publish a copy of the “notice of appointment to each affected person within five business days after the notice was filed”.*

*From the extract above, the business rescue practitioners were appointed by the company after the Board of the Company had taken the decision to begin voluntary business rescue and filed the resolution with the CIPC.*

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

QUESTION 3 (essay-type question) [15 marks] [5]

***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.***

*The winding up of an insolvent company is governed by the Companies Act 1973 while the winding up of a solvent company is addressed by the Companies Act 2008. In addition to these legislations, the Insolvency Act also applies to an insolvent company.*

*The liquidation of a company may be done voluntarily by a special resolution of the shareholders of the company or compulsorily by an application to the court. Once a company is placed under liquidation, a liquidator is appointed either by the Master or the shareholders. The ultimate duty of the liquidator is to take control of all immovable and movable properties of the company under liquidation.*

*At the point of liquidation, there is a possibility that contracts entered into by the insolvent company may not have been fully performed or have been partially performed. These types of contracts are termed as executory contracts. An executory contract is a contract still subsisting when one party becomes insolvent. For such contracts, some obligations remain to be performed by either or both parties when one of the parties is declared insolvent.*

*The types of contracts anticipated here include agreements for goods or services to be provided, lease agreements, and employment contracts among others. The treatment of these contracts when a company becomes insolvent is therefore of importance as it affects the parties to the contract in question, creditors and other stakeholders involved with the insolvent company.*

*In general, the commencement of a business rescue proceeding (question specifically states that it is liquidation proceedings) does not automatically terminate a contract which is yet to be fully performed by the parties to the contract. However, the rescue practitioner appointed may under section 136 (2) of the Companies Act, decide to “entirely, partially or conditionally suspend, for the duration of the business rescue*

*proceedings, any obligations of the “in insolvent company that arose from an agreement which the company was a party to before the company started the business rescue proceeding. The power given by the rescue practitioner can also decide to take similar actions on agreements contracted during the rescue process. The Companies Act does not indicate the time within which the business rescue practitioner should take steps on the contracts.*

*Despite the general position, there are some exceptions. The business rescue practitioner when exercising the powers conferred under section 136 (2), the “business rescue practitioner must not suspend any provisions of; an employment contract” or agreements specified under sections 35 A and 35 B of the Insolvency Act, 1936.*

*Under section 136 (1), persons in the employment of the company before the business rescue proceeding “continue to be so employed on the same terms and conditions” unless to the “extent that changes occur in the ordinary course of attrition” or that “the employees and the company, in accordance with applicable labour laws, agree different terms and conditions. In case there is redundancy, the employees shall be treated in accordance with the Labour Relations Act, 1995 and other applicable employment related legislations.*

*For employment contracts, at the time that a company is placed under liquidation [1], the continuous involvement of the employees may be beneficial to the company. This is because the company is likely to make more income and continue to honour some essential contracts or services. This would mean the company is likely not to accumulate further debts from breaches or failures in honouring clients' requests. As indicated, this will also mean the company will be able to make more income even whilst going through the liquidation process. At the end of the day, the actions of the employee will be beneficial to the company, creditors and other stakeholders.*

*As indicated above, section 136 2 A specifically restricts the business rescue practitioner and the court not to suspend or cancel any provision of agreements that fall within sections 35A and 35B of the Insolvency Act. The type of agreements contemplated under 35A and 35B include contracts on “transaction on an exchange” and “agreements providing for termination and netting.”*

*In sum, the treatment of executory contracts under liquidation proceedings is guided by the principle of protecting the interests of creditors [1] while managing the liquidation process. While the general rule is that executory contracts are not terminated once a company enters liquidation, [1] there are exceptions. These exceptions are premised on the fact that the contract must be necessary for the liquidation process or the benefit of the company. Should it be determined by the liquidator that the continuation of the contract is necessary, the liquidator can decide to terminate [1] or continue [1] with the contract if it benefits the company, creditors and other stakeholders.*

***In this answer liquidation proceedings and rescue proceedings have been confused with each other, and therefore the incorrect principles have been discussed.***

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

***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.***

***For ease of reference, I will address each individual under their respective headings;***

**Charles White**

*From the facts, the directors of the company ABC Pty Ltd (herein the Company) have commenced a business rescue proceeding. The commencement of the business rescue proceeding was initiated by the board adopting "the relevant board resolution" and taking steps to file same with the Companies and Intellectual Property Commission (CIPC).*

*Again, from the facts, it is deduced that the board of the Company resolved to take this step when it realised that there was no 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 further that the company would "most likely reach a situation where its liabilities exceed its assets".*

*The route adopted by the Company therefore is a voluntary business rescue. Under section 128 (b) of the Companies Act, 2008, a business rescue is a proceeding "to facilitate the rehabilitation of a company that is financially distressed." A business rescue proceeding therefore leads to "a temporary moratorium on the rights of claimants against the company or in respect of property in its possession"*

*Section 133 of the Companies Act, 2008 places a general moratorium on legal proceedings against a company when a company is going through a business rescue proceeding. The legal proceedings include "enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession". Though this is a general position, there are some exceptions. For instance, the moratorium can be lifted with the written consent of the business rescue practitioner or with the leave of the court among others.*

*From the above and with the facts, it is clear that the proceeding initiated in court by Charles White to recover the amount of ZAR 500,000.00 is ongoing. Of this fact, the moment the company commenced rescue proceedings voluntarily, there came into force a moratorium on the ongoing legal proceeding against the Company. **Prove claim at first meeting***

*Looking at the exceptions, I will propose one of these options for Charles White;*

- 1. Take steps to obtain the written consent of the Company's business rescue practitioner, Donovan Jones to enable Charles White to conclude the matter in court which is "almost finalised"*
- 2. Apply to the court for leave to proceed with the matter.*

**Rowena Gonzales**



*Considering the facts of Rowena Gonzales, she is an employee of the Company. She has worked with the Company for "the last five years" and appears to still be in the employment of the Company.*

*Section 136 of the Companies Act, 2008 gives direction on what happens to employees during a business rescue proceeding. Section (1) (a) in particular states that "during a company's business rescue proceedings, employees" who were in employment before the company commenced the rescue proceeding, continue to be employees "on the same terms and conditions of their employment".*

*There are however some exceptions to this general position. The general position remains except where "changes occur in the ordinary course of attrition" or the employee and the company going through the business rescue proceeding agree on contrary terms and conditions in line with the "applicable labour laws."*

*In any case under section 136 (1) (b), "despite any provision of any agreement to the contrary, any retrenchment of any such employees contemplated in the company's business rescue plan is subject to" the "Labour Relations Act and other applicable employment related legislation."*

*From the provisions of the Companies Act, Rowena Gonzales as an employee of the Company will remain an employee unless, changes occur in the ordinary course of attrition or that she together with the Company decide to alter the terms and conditions of the relationships in line with the applicable labour laws.*

*Alternatively, and as provided under section 136 (1) (b) if Rowena Gonzales is made redundant per the terms of the business rescue plan, issues relating to her redundancy will be regulated by the Labour Relations Act 67 of 1995 specifically sections 189 and 189A and other related labour legislation.*

#### **Mario Miles**

*Generally, contracts entered into by a company undergoing business rescue proceedings are not automatically terminated. Despite this, the rescue practitioner on his/her appointment can decide to terminate the obligations of a company under a contract whether in whole or part by an order of the court.*

*Regardless of the above, some contracts are deemed essential for the survival of the company most especially when the company is going through a business rescue proceeding.*

*One such essential contract is that entered into by Mario Miles and the Company. Presently, the Companies Act does not provide for such an essential contract during the rescue proceeding.*

*It is however observed that due to the nature of this particular contract, the rescue practitioner cannot just terminate the obligations of the company under the lease agreement.*

***More information is required here: suspension; case law discussion; ranking***

***Trudy Pather -Shareholder***

*A Shareholder is said to be an owner of a company. The evidence of one's ownership is among others, evidence by the shares issued by a company.*

*Whether or not a decision by a company to commence a business rescue proceeding will affect shareholders is dealt with under section 137 (1) of the Companies Act.*

*The cited section reads as follows;*

*“during business rescue proceedings an alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business, is invalid.”*

*There are however exceptions to this provision. The action provided under section 137 (1) can be validly done if it was done per the orders of the court or approved as part of the business rescue plan of the company.*

*Due to the above, generally, the decision of the company to voluntarily commence a business rescue proceeding should not lead to the loss of Trudy Pather's shares in the Company unless, the court has given an order to that effect or that the rescue plan contemplates such loss and same has been approved as the business rescue plan of the company.*

*Per the facts, there is no indication that the approved plan contains a condition that shareholders of the Company will lose their shares and neither is there a court order in place directing that she should lose her shares as part of the rescue proceeding.*

*I am therefore of the opinion that though the fears entertained by Trudy Pather are possible, per the actions taken and the facts presented, there is no present danger of her losing her shares in the Company.*

***Henry Jean-Director***

*Henry Jean as a director, is also “unsure as to his position and role now that the business rescue proceedings have commenced”. Again, section 137 is relied on.*

*Section 137 (2) (a) specifically states that “during a company's business rescue proceeding, each director of the company must continue to exercise the functions of director” subject only to the rescue practitioner. In so far as one remains a director, the director is bound by the provisions of sections 75 and 137 (2) (c) of the Companies Act 2008.*

*Again, in so far as a director acts on the instructions and authority of a rescue practitioner, the director is discharged from his duties of a director as stated under section 27 and the liabilities under section 77 with the exception of section 77 (3) (a), (b) and (c)*

*Directors are expected to “attend to the requests” of the rescue practitioner always and also submit to the rescue practitioner any information so requested by him. The Board of directors or any director is required to obtain the approval of the rescue practitioner before taking any action on behalf of the company. Should the Board or any director go contrary to this provision, the action done is void unless approved by the rescue practitioner.*

*Despite the above, the rescue practitioner may on an application to the court, seek an order to remove a director of the company on grounds which include; the failure of the director to act in accordance with the requirements imposed under section 137 or by an action of the director “by act or omission, had impeded or is impeding” the rescue practitioner “in the performance of the powers and functions”.*

*In all, I am of the opinion that Henry Jean remains a director of the Company at the pleasure of the rescue practitioner. For as long as he remains a director, he must comply with all directives from the practitioner. Should Henry Jean fail to do so the practitioner can apply to the court for his removal on stated grounds.*

*From the facts, there no is indication that Henry Jean is acting contrary to the directives of the rescue practitioner neither is there an indication that Henry Jean is acting or impeding the functions and performance of the rescue practitioners’ duties. If there was such an indication, I would have been of the opinion that Henry Jean’s role as a director in the company is rather insecure.*

*Per the facts, however, and in so far as Henry Jean is compliant with the provisions of the Companies Act, his role as a director remains.*

***Further considerations: affected persons, binding offers, cram-down***

**\* End of Assessment \***