



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] [8/10 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 essence of business rescue proceedings is to enable a financially distressed company to rehabilitate. Therefore, business rescue proceedings result into a moratorium or stay of certain proceedings against the company. However, the following proceedings are exempt from the moratorium under business rescue proceedings;

1. Criminal proceedings against the company or any of the Directors and officers of the company
2. Proceedings pertaining to any property or right in which the company has powers of a trustee
3. Proceedings instituted against the company by a regulatory authority in the execution of its duties.]

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.

1. Funeral expenses,
2. Costs of sequestration,
3. Employee's claims,
4. Income tax,
5. 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?

[From the extract above it is clear that the Business Rescue Practitioner was appointed under Voluntary business rescue option at the instance of the Board and the employees as the Resolution was lodged with the Companies and Intellectual Property Commission (CIPC) within the prescribed 5 days and the first meetings were held with all interested or affected stakeholders.]

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

QUESTION 3 (essay-type question) [15 marks] [7]

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 executory contracts are not provided for under any South African legislative regime but is regulated by common law [1] principles of law of contract which have been aligned to insolvency. Therefore, liquidation proceedings do not suspend or terminate any contract to which the company is a party. [1] If the company is a party to an executory contract upon liquidation, the party's performance is a right which the Liquidator may enforce. [1] Additionally, if the company's contractual performance is still outstanding, the Liquidator may elect to abide[1] by, or reject[1] the contract. The preceding power is aimed at ensuring that the Liquidator acts in the best interest of the creditors [1]of the company. However, if the Liquidator elects to abide by the contractual terms the company is entitled to receive performance if the other party owed to the insolvent company. [1] The company cannot claim specific performance if it rejected the execution of the contract.]

Exceptions not discussed.

QUESTION 4 (fact-based application-type question) [15 marks] [8] Good attempt but more information 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.

[This legal memorandum seeks to explain the legal rights and potential outcomes of the parties respective situations following the setting in motion of the business rescue proceedings of ABC (Pty) Limited by its Directors. The effect of the business rescue proceedings on other pending proceedings is the automatic stay or moratorium [1]. In other words, once business rescue proceedings are commenced all legal proceedings against the company are stayed except criminal proceedings, proceedings instituted by a regulatory in execution of its duties, proceedings instituted as a set off and proceedings pertaining to any property or right over which the company exercises the powers of a trustee. In the context of the question at hand and in relation to Charlie White's matter in the High Court, the proceeding will be

stayed as they do not fall under the proceedings which are exempted by the moratorium that comes with business rescue proceedings. [1] **Prove claim at first meeting**

It is worthy of note that business rescue proceedings result in the appointment of a business rescue practitioner who in turn takes over full management control of the company with duties and liabilities of the Director. Therefore, in relation to Rowena Gonzales' concern over her employment status, I opine that the business rescue proceedings have no effect on her employment [1] and the employees of the company continue being employees on the same terms and conditions preceding the proceedings unless that changes occur in the ordinary course of attrition or the employees and the company agree different terms and conditions as provided for under the requisite labour laws. [1] The effect of the business rescue proceedings on Mario Miles lease office space to the company is that the lease agreement will still continue being in force however [1], the claim for rent falling due during the pendency of the business rescue proceedings is neither financing nor cost of the business proceedings therefore such claims are not preferential claim. [1] **Case law discussion; rights of BRP to cancel, or suspend partially, entirely or conditionally**

The business rescue proceedings have no effect on the shareholding of the company therefore; the rights and obligations of a shareholder are not affected as a result of the business rescue proceedings. Therefore, Trudy Pather will not lose her shareholding in the company. [1] **Plan may propose changes**

As earlier stated in this memorandum, the effect of business rescue proceedings is vesting of the management control in the hands of the Business Rescue Practitioner. Therefore, Henry Jean cannot and will not continue to the Director [**remains a director**] of the company following the institution of business rescue proceedings on the ground that it is the business rescue practitioner with the management functions and the only time Henry Jean can exercise the powers of a Director is when the Business Rescue Practitioner elects to delegate [1] such functions to him or when he is appointed to fill a vacancy in the office of Director.]

Further considerations:

- *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*

* End of Assessment *