



TOTAL = 46 / 50 (92%) Excellent!

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.

1. Criminal proceedings against the Company, its directors or officers;
2. Proceedings brought against the company by a regulatory authority in the performance of its duties.
3. Proceedings relating to property or a right where 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.**

(b), (a), (e), (c), (d).

Question 2.3 [maximum 2 marks] [2]

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?

The joint business rescue practitioners would have been appointed by a board resolution passed and adopted by the directors of Mapochs filed with the Companies and Intellectual Property Commission (CIPC). The company would have commenced voluntary business rescue proceedings by filing the resolution, upon reasonable grounds to believe that there appears to be a reasonable prospect of rescuing the company.

QUESTION 3 (essay-type question) [15 marks] [14] Excellent 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.

Executory contracts in liquidation are treated in much the same way as in sequestration in terms of the Insolvency Act. [1] Executory contracts are regulated by the common law. [1] If the company is a party to an executory contract at the time of its liquidation, and the other party's performance is outstanding, the liquidator can enforce performance as it is seen as an asset to the estate. [1] If the company's performance under the executory contract is due, the liquidator may elect to abide [1] or reject the contract. [1] Before electing, the liquidator must obtain the prior approval of the creditors. [1]

- *If the liquidator elects to abide by the contract, he 'steps into the shoes of the insolvent' and is entitled to receive any performance owed to the insolvent and is bound to render any reciprocal performance due to the other party*
- *Once the liquidator has exercised this election right he cannot change his mind*

Where the liquidator elects to reject performance by the company in liquidation, the other party may rely on legal remedies [1] for breach of contract like damages. [1] The other party is not entitled to claim specific performance. The exceptions to the right of election by the liquidator are in the following cases; [1]

- a. Under the Alienation of Land Act 68 of 1981, the liquidator must authorise transfer of ownership of land to a purchaser if the following conditions are met namely; [1]
 - The purchase price is to be paid in two or more instalments,
 - The land must be used for residential purposes,
 - The land must be capable of registration in the Deeds Office,
 - The contract of sale must be captured in the Deeds Office by way of endorsement on the title deed
 - Payment of transfer and other costs must be effected.
- b. Under s. 36 of the Insolvency Act, if the company goes into liquidation before it pays the purchase price but after it takes delivery of moveable property, the seller may reclaim the property if he gives written notice to the purchaser or trustee or Master within 10 days of delivery thereof that he claims the property. This provision was designed to protect innocent sellers who deliver goods to debtors shortly before bankruptcy as long as they acted promptly. [1]

- c. Under instalment sale agreements where a company is liquidated before performance is due, the seller acquires a hypothec over the goods subject to the agreement. Liquidation causes ownership of the goods to pass to the insolvent estate. [1]
- d. In terms of lease agreements, when the estate of the lessee of moveable or immovable property is sequestrated, the liquidator may immediately cancel the lease by written notice. The lessor would have a concurrent claim for damages arising as a result of the cancellation. The lessor in addition also has a hypothec over immovable property brought onto the premises for any arrear rental that accrued before the winding up order. [1]

In the case of the lessor's estate being liquidated, with respect to immovable property, the principle of "lease comes before a sale", (*huur gaat voor*) will apply. Hence any sale of the property by the liquidator will be subject to the existing lease over the property. If a mortgage bond was registered prior to the lease, then the mortgage bond holder's rights rank above the lessee's.

- e. Employment contracts are suspended upon the winding up order and terminated 45 days from the appointment of a liquidator. They may be terminated earlier after consultation with the parties like trade unions where employees belong to a union recognised by the employer company. [1]

QUESTION 4 (fact-based application-type question) [15 marks] [13] Excellent!

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.

MEMORANDUM TO AFFECTED PARTIES IN THE BUSINESS RESCUE PROCEEDINGS OF ABC (PTY) LTD.

In terms of section 128(1)(a) of the Companies Act of 2008, an “affected person” to business rescue proceedings is defined as shareholder or creditor of the company and any registered trade union representing employees of the company, in its absence the employees themselves. The following persons fall within the definition of an affected person in terms of s.128 (1)(a) of the Companies act namely:

- Charlie White, an unsecured creditor;
- Rowena Gonzales, an employee of the company;
- Mario Miles a lessor of ABC (Pty) Ltd;
- Trudy Pather, a shareholder of the company and;
- Henry Jean, a director of the company.

The effect of the Business Rescue proceedings is that legal proceedings against the company inclusive of enforcement action are stayed. Having full management control of the company, the business rescue practitioner, Donovan Jones, may delegate powers and functions to the directors of the company and this would include Henry Jean.

As an employee, Rowena Gonzales is entitled to be paid for any arrears in salaries accrued before the commencement of the business rescue proceedings.¹ The payments rank 4th in priority after the business rescue practitioner's remuneration and other expenses, remuneration to an employee due during business rescue, and finance claims obtained during business rescue. As an employee, Rowena during business rescue proceedings, continues to be employed on the same terms and conditions as immediately before the proceedings. Rowena is free to agree with the company to different terms and conditions of employment in accordance with the labour laws.

Pre-commencement claims are part of the business rescue plan. There is however no clear guideline on the administration of claims in business rescue proceedings, creating uncertainty. The proving of claims at the 1st meeting is to facilitate Donovan Jones in drafting the plan and resolve potential disputes.

With respect to the lease agreement, Donovan Jones may elect to entirely, partially or conditionally suspend the obligations of the company or cancel the obligation by a court order.² Mario Miles may also elect to cancel the lease and seek damages. The moratorium on legal proceedings does not prevent a creditor from cancelling an executory contract after the company has been placed in business rescue.³ In a business rescue plan the landlord's claim for rent falling due during business rescue is not a preferential claim. Mario Miles is in an unsecured position during business rescue unless he is able to successfully negotiate for rentals with Donovan Jones.

As a director, Henry Jean whilst ABC is under business rescue remains duty bound to disclose his personal financial interest or those of related persons.⁴ He is under the authority and instruction of the business rescue practitioner. He remains liable for loss sustained by the company as a result of:

- Acting on behalf of the company knowing he does not have authority;⁵
- Agreeing to carry out the company's business despite knowing the it is being conducted recklessly, grossly negligently, or with an intent to defraud or for a fraudulent purpose;
- Being party to an act or omission with knowledge that the activity is meant to defraud a creditor, employee or shareholder or company or that it has other fraudulent purpose.

Directors however do not lose their positions and continue to exercise the functions of a directors, subject to the wishes of the business rescue practitioner.

¹ Companies Act 2008 s. 144(2).

² Idem s. 136 (2)(a) and (b).

³ *Cloete Murray NO & Anor v FirstRand Bank Ltd [2015] ZASCA 39 (26 March 2015).*

⁴ Companies Act 2008 ss. 75 and 137(2)(c).

⁵ Idem s.77(3)(a).

In terms of section 146, as a shareholder, Trudy Pather is entitled to the following:

- Notice to any event concerning the business rescue proceedings;
- Participation in any court proceedings arising during business rescue;
- Participate in the company's business rescue;
- Vote to approve or reject a proposed business plan if it will alter her shareholding in the company;
- Participate in the development of an alternative business plan if it's rejected
- Present a proposal to acquire the interest of any or all the creditors

As affected parties, the above persons and the management of the company must be consulted to prepare a business plan which maybe subsequently adopted. A business plan that changes the rights of any class of holders of the company's securities, a vote by the majority of the holders of the securities is sufficient to approve the plan.⁶ *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*

The adopted business plan is binding on the company, each creditor of the company and every holder of the company's security.⁷

* End of Assessment *

⁶ Companies Act 2008 s. 152 (3)(c).

⁷ Idem s. 152 (4).