



TOTAL: 44/50 = 88%. 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.

- [(i) proceedings against the company by a regulatory authority in the execution of its duties***
- (ii) proceedings concerning any property or right over which the company exercises the powers of a trustee***
- (iii) 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.**

[

- *Funeral expenses*
- *Costs of sequestration*
- *Employee's claims*
- *Income tax*
- *Claim secured by a general bond]*

Question 2.3 [maximum 2 marks] [1]

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

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

[Joint business rescue practitioners have been appointed by the debtor [1] within 5 business days after filing a resolution to commence voluntary business rescue with the CIPC. In order to be appointed, the joint business rescue practitioners have to satisfy the requirements for appointment and submit the consent in writing.]

Appointment in the board resolution

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

[With respect to executory contracts under the company liquidation proceedings, the common law principles and statutory exceptions in terms of the Insolvency Act are applicable to the company[1], although there are no provisions related to the treatment of essential contracts[1]. It should be noted that the meetings of creditors or members give their authority, or on directions of the Master in case of a winding-up by the court.

The trustee has the right to abide, by or reject, [1] the executory contract by obtaining the instructions from the general body of the [1]creditors. If the trustee chooses to abide by the executory contracts, the trustee have to perfume the obligations to the other party. [1] If the executory contacts are rejected, the other contracting party may claim the damages rather than specific performance under the executory contracts. [1] However, with respect to the trustee’s right, there are some exceptions as follows:

- (i) Sale of immovable property; [1]*
- (ii) Sale of movable property; [1]*
- (iii) Lease agreements; and[1]*
- (iv) Employment contracts. [1]*

With respect to sale of immovable property above, when a seller is under the liquidation proceedings before transfer of immovable property, the trustee must transfer the ownership to the buyer, provided that the purchase price is to be paid in two or more instalments. On the other hand, when a buyer is under the liquidation proceedings before transfer of immovable property, the trustee have the right to abide by, or reject, the contract within six weeks, and if he does not elect either of them, the seller may apply to the court for cancellation of the contract. [1]

With respect to sale of movable property above, when a buyer is under the liquidation proceedings before paying the purchase price but after delivering the property, [1] the seller has the right to reclaim the property by sending the notice in writing to the buyer, the trustee or the Master within 10 days of delivery thereof that she/he reclaims the property. On the other hand, when a buyer is under the liquidation proceedings before paying the purchase price under an instalment agreement, the seller will obtain a hypothec over the products, resulting in the transfer or the ownership to the buyer. However, when a seller is under the liquidation proceedings, these exceptions above are not applicable, i.e., the trustee has the right to abide, by or reject, the executory contract. [1]

With respect to lease agreements, the trustee as lessee may cancel them by sending the written notice. As a result, the lessor may claim the damage against the lessee and obtain the hypothec over immovable property brought onto the premises for any rent in arrears due before the commencement of the liquidation procedures. If the trustee does not cancel the lease agreement within a 3 month period after her/his appointment, it is regarded that the lease is automatically cancelled. When a lessor of immovable property is under the liquidation proceedings, the sale of the property by the trustee will be bound to the lease agreement if the principle of "lease goes before sale" applies. [1]

With respect to employment contracts, when an employer is under the liquidation proceedings, all employment contracts are suspended. The trustee has the right to terminate such contracts only after the consultation with the relevant parties, e.g., registered trade unions or the relevant employees, in terms of receiving proposals to save or rescue the business or a part thereof. If the trustee does not reach continued employment, all employment agreements will be automatically terminated 45 days after the appointment of the trustee.] [1]

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.

[With respect to (a) above, the business rescue proceedings trigger the moratorium, resulting in the stay of the enforcement action against the company. Therefore, the proceedings initiated by Charile will not be proceeded unless the business practitioner or the court gives the permission to lift the moratorium. In addition, the pre-commencement claims, including Charlie's claim against the company, are subject to the business rescue plan, which will be prepared by the business rescue practitioner thorough the consultation with creditors, other affected parties and the management of the company. Assuming that the business rescue plan is supported by 75% of voting interests and 50% of independent creditors' voting interest, when the content of the business rescue plan is to discharge a part of the pre-commencement claims, Charlie will be forced to discharge its claims against the company under the business rescue plan.

With respect to (b) above, the conditions of the employment contract with Rowena will not be changed unless the company complies with the relevant labour law because the business rescue practitioner does not have the right to elect suspend of the obligations of the company, or cancel contracts by obtaining the court order.

With respect to (c) above, although the lease agreement between the company and Mario might be regarded as executory essential contract, there are no provisions for the treatment of essential contracts. Therefore, the business practitioner might suspend the obligation based on the lease agreement, or cancel the lease agreement by obtaining the court order. In addition, when the company does not pay the fee to

Mario before the business rescue proceedings, such Mario's claim against the company might be discharged based on the business rescue plan. **Case law: Cloete Murray, BP Southern Africa, Kythera**) Please see the description related to (b) above in terms of the requirement that the plan is binding.

With respect to (d) above, affected persons, which are inclusive of shareholders, are subject to the business rescue plan, which is prepared by the business rescue practitioner through the consultation with affected parties and the management of the company. Therefore, when the content of the business rescue plan is to discharge a part of the shares, Trudy will be forced to discharge his shares. **General: shareholders' right will not be amended unless in the ordinary course of business or by way of a court order or pursuant to an approved business rescue plan.** Please see the description related to (b) above in terms of the requirement that the plan is binding.

With respect to (e) above, the business rescue practitioner has the full management control of the company in substitution for the board and management by the commencement of the business rescue proceedings. The business rescue practitioner might remove Henry from office.]

- **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.**

Other considerations:

- **These are all affected persons**
- **Rights may be affected in terms of the business rescue plan**
- **In respect of approval of the business rescue plan - any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined on the request of the practitioner to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated**
- **Cram-down - bound by majority vote**

* End of Assessment *