



TOTAL: 41/50 = 82%
Very good effort!

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

SOUTH AFRICA

This is the summative (formal) assessment for Module 7D ***of this course and must be submitted by all candidates who*** selected this module as one of their elective modules.

The mark awarded for this assessment will determine your final mark for Module 7D. ***In order to pass this module, you need to obtain a mark of 50% or more for this assessment.***

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.

- 1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.**
- 2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Arial font. This document has been set up with these parameters - please do not change the document settings in any way. DO NOT submit your assessment in PDF format as it will be returned to you unmarked.**
- 3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).**
- 4. You must save this document using the following format: [studentID.assessment7D]. An example would be something along the following lines: 202223-336.assessment7D. Please also include the filename as a footer to each page of the assessment (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. Assessments that do not comply with this instruction will be returned to candidates unmarked.**
- 5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6. The final submission date for this assessment is 31 July 2023. The assessment submission portal will close at 23:00 (11 pm) BST (GMT +1) on 31 July 2023. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.**
- 7. Prior to being populated with your answers, this assessment consists of 9 pages.**

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total] [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.

- (i) criminal proceedings instituted against the company and /or its office bearers or directors (s.133(1)(d) of the Act);**
- (ii) proceedings involving any property or right over which the company exercises power as a trustee (s.133(1)(c) of the Act); and**
- (iii) proceedings taken out by a regulatory authority against the company, in exercise of the former's regulatory power (s.133(1)(f) of the Act).**

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.**

The correct order of preference is:

- (a) Funeral expenses;**
- (b) Costs of sequestration;**
- (c) Employee's claims;**
- (d) Income tax;**
- (e) Claim secured by a general bond.**

Question 2.3 [maximum 2 marks] [1]

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 BRPs would have been appointed by the company pursuant to s.129(3)(b) of the Act which required the company to do so within 5 days from 20th April 2015, being the date of filing of the resolution to commence voluntary business rescue proceedings at the CIPC. As part of the appointment process, the company would also have had to file a notice of appointment of the BRPs at the CIPC and to publish it within 5 days thereafter to all affected persons (s.129(4) of the Act).

In the board resolution placing the company under business rescue.

QUESTION 3 (essay-type question) [15 marks] [12] Very good 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.

An executory contract is one in which the promises are to be performed in the future or remain to be fulfilled (Osborn’s Concise Law Dictionary 11th edition, Sweet & Maxwell: London at p.177).

Liquidation proceedings do not automatically terminate or even suspend an executory contract. [1] Instead and as a general rule (based on the common law), [1]the liquidator has the option of honouring[1] or rejecting[1] the contract.

If the liquidator chooses to abide by the executory contract, he assumes the position of the insolvent company and is bound to honour the executory contract in the stead of the insolvent company and to insist on and enforce performance by the other contracting party. [1]

- ***Once the liquidator has exercised this election right he cannot change his mind***

Alternatively, if the liquidator wants to reject the executory contract then he must seek the approval of the creditors [1]before he can do so as the option to honour or reject an executory contract is meant to allow the liquidator act in the best interests of the creditors.

If the liquidator elects not to honour the executory contract, the other party cannot insist on specific performance [1]but can seek damages for breach of contract. [1]

The aforesaid position under the common law is modified by statute and it is noteworthy that while the Companies Act, 1973 governs the liquidation of insolvent

companies, s.339 thereunder allows for gap fillers from the general body of insolvency law which includes the Insolvency Act. Some exceptions to the common law approach to executory contracts include:

- (i) if liquidation proceedings are commenced before completion of a sale of immovable property [1] by an insolvent company, then in certain circumstances, the liquidator can be compelled to conclude the transfer of the property to the purchaser (Alienation of Land Act No. 68 of 1981) and he cannot elect to reject it;
- (ii) if liquidation proceedings are commenced before full payment (by an insolvent company) for purchase of movable property agreed to be made in instalments, [1] then ownership in the property will pass to the insolvent company while the unpaid seller will have a hypothec over movable property (s. 84 of the Insolvency Act);
- (iii) upon commencement of liquidation proceedings, all contracts of employment [1] between the insolvent company and its staff are suspended and in the absence of an agreement for continuity, the employment contracts terminate 45 days after appointment of a liquidator (s.38(1) and 38(9) of the Insolvency Act); and
- (iv) if the insolvent company is a lessor of immovable property [1], a sale of it by the liquidator may be subject to the lease agreement which may remain binding (on the purchaser), if the principle of 'lease goes before sale' is applicable.

No provision is made for the treatment of essential contracts

Sale of movable property: cash sale not discussed

QUESTION 4 (fact-based application-type question) [15 marks] [12] **Very 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.

Charlie White (CW). The commencement of business rescue proceedings (BR proceedings) would trigger an automatic moratorium staying proceedings against the company in general (for the duration of the BR proceedings), including his debt recovery case since it does not fall under the statutory exceptions (s.133(1) of the Companies Act 2008, hereinafter referred to as the "Act"). Since his is a pre-commencement claim it would have to be included in the business rescue plan, subject to him exercising his right to prove the claim at the first meeting of creditors (s.147(1)(a)(ii) of the Act). He would also have the right to vote on the creditors' adoption or otherwise of the plan (s.145(2) of the Act). If the company is successfully rehabilitated, then CW would be paid in accordance with the plan. However, it is possible that rehabilitation may be unsuccessful such that the company may then go into liquidation in which case the pecking order would be that after secured creditors are paid from the value of the assets they hold as security, the free residue would go first to satisfying the statutory preferred creditors before lastly getting to concurrent creditors like CW if at all there is anything remaining.

Rowena Gonzales (RG). The continued existence of her employment contract on the pre-existing terms is expressly protected by the Act (s.136(1)(a)) and any changes in terms would be subject to freedom of contract and the prevailing employment law. Any claim she may have to gratuity or other long service entitlement for the 5 years

worked prior to commencement of the BR proceedings would be a preferred unsecured debt (s.144(2)).

Mario Miles (*MM*). *The lease agreement which he has with the company would not automatically terminate at commencement of the BR proceedings. However, MM would have the right to terminate it in accordance with the terms and the relevant law. The business rescue practitioner would for his part have the power to suspend (entirely, partially or conditionally) the company's obligations under the lease (s.136(2)(a) of the Act) or to apply to Court for an order cancelling some of its terms (s.136(2)(b) of the Act). MM's recourse against the business rescue practitioner's departure from the bargain embodied in the lease would be a claim for damages for breach of contract (s.136(3) of the Act). Before its gets to that, he could make representations to the business rescue practitioner for the lease (and the company's obligations thereto) to be factored in the business rescue plan. **Case law discussions; ranking***

Trudy Pather (*TP*). *The commencement of BR proceedings (in itself) would not affect TP's shareholding in the company as (under s.137(1) of the Act) the only effect is a bar to any changes to the classification of the issued shares (or alteration of their status) other than through a share transfer in the ordinary course of business. In terms of participation, by virtue of her shareholding, TP would be entitled to notice of any court case, meeting and event concerning the BR proceedings and also to vote to approve or reject the business plan if it would alter the rights attached to her shareholding (see s.144 of the Act).*

Henry Jean (*HJ*). *One of the effects of BR proceedings is that the power of the board of directors to manage the affairs of a company is taken over by the business rescue practitioner (s.140(1)(a) of the Act). Accordingly, HJ and the rest of his directors would not be able to exercise their powers as directors for the duration of the BR proceedings, unless it is otherwise delegated to them and as directed by the business rescue practitioner (s.140(1)(b) of the Act). HJ would also have to cooperate with the business rescue practitioner including provision of all books and records of the company which may be in HJ's possession and information generally on the affairs of the company (s 137(3) and s.142 of the Act). Further, provided that during the business rescue practitioner's investigations into the company's affairs, HJ is not blameworthy for any losses incurred by the company resulting from grossly negligent or fraudulent acts, then he would also be free from personal liability as a director (s. 77(3)(b) and (c) of the Act).*

Further considerations: affected persons; binding offers; cram-down

* End of Assessment *