



TOTAL: 45/50 = 90%
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.

Procedures that are excluded from the moratorium on business redemption procedures imposed by section 133 of the Companies Act 71 of 2008 are: (i) proceedings instituted as a set-off against any claim made by the company in any legal proceedings;¹ (ii) criminal proceedings against the company or any of its directors or

¹ Companies Act 2008, s 133(1)(c).

officers;² and (iii) proceedings concerning any property or right over which the company exercises the powers of a trustee.³⁻⁴

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 order of preference is: (i) funeral expenses; (ii) costs of the sequestration; (iii) employee's claims, limited to certain amounts; (iv) income tax; and (v) claim secured by a general bond.⁵

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

² Companies Act 2008, s 133(1)(d).

³ Companies Act 2008, s 133(1)(e).

⁴ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 43.

⁵ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 28-30.

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?

Under Section 129(3) of the Companies Act 2008, Mapochs has five business days after filing a resolution to commence voluntary business rescue at the CIPC to appoint a business rescue practitioner who meets the requirements of section 138 of the Companies Act 2008 and who has consented in writing to accept the appointment.⁶ In this case, the presentation of the resolution took place on April 20, 2015, and the business rescue practitioner was appointed on April 21, 2015, within the period provided for by the Companies Act 2008.

After appointing the business rescue practitioner, section 129(4) of the Companies Act 2008 provides that the company has two days to file a notice of appointment of a practitioner and publish a copy of that notice of appointment to each affected person within five business days after the notice was filed.⁷ These events are not indicated in the extract.

Pursuant to section 131(5) of the Companies Act 2008, in granting an order placing Mapochs under supervision and commencing business rescue proceedings, a court may appoint an interim practitioner who satisfies the requirements of section 138, and who has been nominated by the company.⁸ This event is also not included in the extract.

Finally, holders of a majority of the independent creditors’ voting interests must ratify the appointment at the first meeting of creditors,⁹ which must take place in accordance with section 147 of the Companies Act 2008. According to the extract, the first meeting took place on May 26, 2015.

In the board resolution placing the company under business rescue.

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.

In South Africa, the discipline of executory contracts in a liquidation proceeding follows common law [1]principles. In this context, the fact that the debtor is placed

⁶ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 43.

⁷ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 43.

⁸ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 43.

⁹ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 43.

*under liquidation proceedings does not lead to the suspension or termination of the contracts to which it is a party.*¹⁰ [1]

*The trustee may, after consulting the general body of creditors [1], elect to abide [1] or reject [1] the contract, in accordance with the best interests of the creditors. If he chooses to abide with the contract, the trustee will subrogate himself in place of the insolvent, and may demand the any reciprocate performance of the contract. [1] If he chooses to reject it, the other contracting party will have the right to claim the appropriate remedies for breach of contract. [1] Furthermore, once a choice has been made, it cannot be changed.*¹¹ [1]

*There are five limitations to the right to vote: (i) sale of immovable property [1]; (ii) cash sale of movable property [1]; (iii) instalment agreement for sale of movable property; [1] (iv) lease agreements [1] and (v) employment contracts.*¹² [1]

First, if the debtor is the seller of an immovable property, the purchaser is protected by the Alienation of Land Act 68 of 1981.¹³ In this sense, the administrator will not have the right to be elected if the following requirements are met, according to Sanrie Lawrenson:

*"that the purchase price is to be paid in two or more instalments; the land must be used for residential purposes, the land must be registrable in the Deeds Office; the contract must be recorded in the Deeds Office by means of an endorsement against the title deed of the land; and payment of the transfer costs and certain other cost must be made".*¹⁴

*On the other hand, if the debtor is the purchaser of the immovable property, the trustee will have the right to choose. However, the other party may require in writing that the trustee exercise the right of election within six weeks, otherwise the other party shall be entitled to apply to the court to cancel the contract and receive restitution.*¹⁵

*Second, the seller of a movable property who has delivered the product to the debtor who has entered into liquidation before paying the price, may request in writing the return of the product delivered, within 10 days of delivery of the claimed property. This exception is not applied in the case of liquidation of the seller.*¹⁶

Third, if the performance by the purchaser is still pending under the terms of the instalment agreement when the debtor enters into liquidation, the seller will acquire a hypothec on the assets subject to the agreement, although ownership of the assets

¹⁰ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 21.

¹¹ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 21-22.

¹² LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 22-24.

¹³ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 22.

¹⁴ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 22.

¹⁵ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 22.

¹⁶ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 22.

passes to the insolvent state. The same does not apply in case of liquidation of the seller.¹⁷

Fourth, in the event of liquidation of the lessee of movable or immovable property, the trustee may immediately terminate the lease agreement upon written notice, if he does not do so, the agreement will be automatically terminated after three months of the appointment of the trustee. The landlord will have a claim for damages incurred as a result of the cancellation. Also, in the case of leasehold immovable property, the landlord obtains a hypothec on the assets left on his immovable property to cover any overdue rent due prior to the sequestration.¹⁸

In case of liquidation of the lessor, the sale of the property by the administrator will be bound by the lease agreement if the principle of huur gaat voor koop is applicable.¹⁹ Furthermore, Sanrie Lawrenson points out that

If a mortgage bond was registered over the property in question prior to the lease, then the rights of the lessee are subordinate to those of the mortgagee (mortgage bond holder) unless such rights have been waived. The leased property may only be sold free of the lease if an offer received for the property is inadequate to satisfy the mortgagee's claim in full and a better offer can be obtained if the property is sold free of the lease.²⁰

Finally, employment contracts are suspended as a result of the sequestration of the employer's estate. The trustee may choose to abide or terminate the employment contracts, after hearing the interested parties, with a view to the possibility of rescuing the business or part of it. Employment contracts will terminate within 45 days of the appointment of the trustee, unless employees have agreed to their continuation.²¹ [1]

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:

¹⁷ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 23.

¹⁸ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 23.

¹⁹ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 23.

²⁰ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 23.

²¹ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 24.

- (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 regard to Charlie White, its proceedings initiated against the company will be affected by the moratorium provided for in section 133 of the Companies Act 2008, as during the business rescue proceedings, no legal proceedings against the company may be proceeded with any forum. It should be noted that its proceeding does not fall under any of the exceptions provided for by the section 133 of the Companies Act 2008.²²

Charlie White has a pre-commencement claim that must be part of the business rescue plan. Accordingly, the creditor must present proof of his claim to the practitioner at the first meeting of creditors, pursuant to section 147(1)(a)(ii) of the Companies Act 2008.²³

The creditors should be consulted by the business rescue practitioner prior to preparing the business rescue plan.²⁴ After the publication of the plan, which must

²² LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 43-44.

²³ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 46.

²⁴ Companies Act 2008, s 150(1).

occur within a period of 25 days after the practitioner's appointment,²⁵ the creditor must decide whether or not to accept the plan.²⁶

The plan can be approved on a preliminary basis with the support by the holders of more than 75% of the creditors' voting interests that were voted and the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.²⁷ If the business rescue plan does not alter the rights of the holders of any class of the company's securities, approval of that plan on a preliminary basis constitutes also the final adoption of that plan.²⁸⁻²⁹

If the business rescue plan does alter the rights of any class of holders of the company's securities, the final adoption of the plan will depend on the majority of votes of the holders of the classes of securities who rights would be altered by the plan.³⁰⁻³¹ In this context, if Trudy Pather's rights are affected by the plan, she will have the right to vote before final adoption.

Regarding the effects of the plan on Trudy Pather's rights, the possibility of the plan to provide for the conversion of credit into equity stands out,³² so that the shareholder would have a dilution of her capital in the company.

Regarding executive contracts, the commencement of a business redemption procedure does not cause its automatic termination. However, the practitioner may obtain a court order to suspend the company's obligations or cancel the executory contract pursuant to section 133(1) of the Companies Act 2008. The employment contract is an exception to this rule. Therefore, Rowena Gonzales' contract must remain under the same terms and conditions as before the proceedings. Even so, changes in the employment contract may occur in accordance with applicable labour law.³³

In turn, Mario Miles' lease agreement can be affected by the practitioner or cancelled by court order. It should be noted that there are no provisions related to essential contracts such as the lease agreement. While there are plans to change it, the current

²⁵ Companies Act 2008, s 150(5).

²⁶ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 46-47.

²⁷ Companies Act 2008, s 152(2).

²⁸ Companies Act 2008, s 152(3)(b).

²⁹ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 46-47.

³⁰ Companies Act 2008, s 152(3)(c).

³¹ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 46-47.

³² Companies Act 2008, s 150(2)(b)(ii).

³³ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 48.

*understanding is that the Mario Miles claim is not a preferential claim.*³⁴⁻³⁵

Suspension; case law discussion; ranking of claims

Ultimately, the position and function of Henry Jean after the commencement of the business rescue proceedings depends on the business rescue practitioner. Pursuant to section 140(1) of the Companies Act 2008, the practitioner has full management control of the company during the proceedings.³⁶ In this sense, he can delegate any power or function to Henry Jean, as a member of the company's pre-existing management.³⁷ As a rule, each director of the company must continue to exercise the functions of director, subject to the authority of the practitioner.³⁸ On the other hand, the practitioner can also remove Henry Jean from the office.³⁹⁻⁴⁰ The removal order must be granted by the court under section 137(5) of the Companies Act 2008.

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

* End of Assessment *

³⁴ South African Property Association v Minister of Trade and Industry (66068/2016) 2016 ZAGPPHC 1148 (29 November 2016).

³⁵ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 49.

³⁶ Companies Act 2008, s 140(1)(a).

³⁷ Companies Act 2008, s 140(1)(b).

³⁸ Companies Act 2008, s 137(2)(a).

³⁹ Companies Act 2008, s 140(1)(c).

⁴⁰ LAWRENSON, Sanrie, Module 7D Guidance Text: South Africa, INSOL International, London (2022), p 44.