



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

SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

SOUTH AFRICA

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

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

INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT

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

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

ANSWER ALL THE QUESTIONS

QUESTION 1 (multiple-choice questions) [10 marks in total] [8/10 marks]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

Question 1.1

Choose the **correct statement** in relation to the insolvent debtor and rehabilitation (discharge):

- (a) If no claims have been received against the estate within six months of the date of sequestration, the debtor is automatically rehabilitated.
- (b) Once a period of 10 years has lapsed after the sequestration of his estate, the debtor may apply to court for an order of rehabilitation.**
- (c) If the Master has approved a plan of distribution to repay all of the claims against the estate as well as all costs in full, the debtor may apply to the court for rehabilitation.**
- (d) None of the above are correct.

Question 1.2

Choose the **incorrect statement/s** in relation to the recognition of a foreign officeholder:

- (i) The foreign officeholder must apply to the Magistrate's Court for recognition.
- (ii) In the court order the court will include provisions to protect local creditors.
- (iii) The court order must be published in the Government Gazette.
- (iv) The foreign officeholder will only be required to provide appropriate security, and nothing more.

Choose the **correct answer**:

- (a) Option (ii).
- (b) Options (ii) and (iv).
- (c) Option (iii).
- (d) Options (i) and (iv).**

Question 1.3

Choose the **correct statement**:

- (a) In terms of section 83(1) of the Insolvency Act 24 of 1936, a creditor who holds immovable property as security for his claim is required to give written notice of this fact before the first meeting of creditors to the Master and to the trustee.
- (b) In terms of section 83(1) of the Insolvency Act 24 of 1936, a creditor who holds movable property as security for his claim is required to give written notice of this fact before the first meeting of creditors to the Master and to the trustee.
- (c) In terms of section 83(1) of the Insolvency Act 24 of 1936, a creditor who holds immovable property as security for his claim is required to give written notice of this fact before the second meeting of creditors to the Master and to the trustee.
- (d) In terms of section 83(1) of the Insolvency Act 24 of 1936, a creditor who holds movable property as security for his claim is required to give written notice of this fact before the second meeting of creditors to the Master and to the trustee.

Question 1.4

Which of the following factors may persuade the court in exercising its discretion whether to **recognise foreign proceedings**:

- (i) That it is equitable and convenient if the insolvent is resident outside of South Africa.
- (ii) Assets in South Africa are not a prerequisite for recognition.
- (iii) Preference for single proceeding directed by court of domicile.
- (iv) If the order was granted by the court of domicile and the insolvent has movables only it is a mere formality, but for immovable property the court will apply its discretion.

Choose the **correct answer**:

- (a) Option (i).
- (b) Options (ii) and (iii).
- (c) Options (i), (ii) and (iii).
- (d) All of the above.

Question 1.5

In March 2022 Company XYZ was placed in liquidation. The liquidator of Company XYZ became aware of the fact that Company XYZ disposed of property worth ZAR 22,000 to Company ABC for an amount of ZAR 15,000 during October 2021. Directly after the disposition, Company XYZ's liabilities exceeded its assets by ZAR 5,000. **If the disposition is set aside –**

- (a) Company ABC will be required to return ZAR 22,000 to the liquidator of Company XYZ.
- (b) Company ABC will be required to return ZAR 15,000 to the liquidator of Company XYZ.

(c) Company ABC will be required to return ZAR 5,000 to the liquidator of Company XYZ.

(d) Company ABC will be required to return ZAR 7,000 to the liquidator of Company XYZ.

Question 1.6

Choose the **correct statement**:

(a) In respect of a general notarial bond over the movable property of the debtor, a creditor in whose favour the bond has been registered will have a secured claim in terms of the Insolvency Act 24 of 1936 upon the sequestration of the debtor's estate.

(b) In respect of a general notarial bond over the immovable property of the debtor, a creditor in whose favour the bond has been registered will have a secured claim in terms of the Insolvency Act 24 of 1936 upon the sequestration of the debtor's estate.

(c) In respect of a special notarial bond over the movable property of the debtor, a creditor in whose favour the bond has been registered will have a secured claim in terms of the Insolvency Act 24 of 1936 upon the sequestration of the debtor's estate.

(d) In respect of a special notarial bond over the immovable property of the debtor, a creditor in whose favour the bond has been registered will have a secured claim in terms of the Insolvency Act 24 of 1936 upon the sequestration of the debtor's estate.

Question 1.7

A cause of action established by a foreign judgment can be enforced if certain common law requirements are met. Which of the following is **not** such a common law requirement:

(a) The foreign court must have had international competence as determined by South African law.

(b) The enforcement of the judgment must not be contrary to South African public policy or the concept of natural justice, but the judgment need not be final and conclusive.

(c) The enforcement of the judgment must not be contrary to South African public policy or the concept of natural justice.

(d) The judgment must not have been obtained fraudulently.

Question 1.8

Cluck Company Limited (the company) wishes to obtain funding in order to expand its poultry and egg enterprises. As part of the security package negotiated with the lender, the lender requires that the company provide its tractors and incubators to it as security. The company makes use of the tractors and incubators on a daily basis. This **form of security** required is a:

(a) Pledge.

(b) Hypothec.

(c) Cession in security of a debt (*in securitatem debiti*).

(d) Special notarial bond.

Question 1.9

Which of the following is / are **incorrect** in relation to the recognition of foreign judgments:

- (a) All foreign judgments are enforced in terms of the Enforcement of Foreign Civil Judgments Act 32 of 1988.
- (b) All foreign judgments are enforced in terms of the common law.
- (c) Foreign judgments are directly enforceable in South Africa.

(d) All of the above.

Question 1.10

In accordance with the South African common law dealing with cross-border insolvency, the **assets** of an insolvent are governed as follows:

- (a) Movable property is governed by the law of the natural person's domicile (*lex domicilii*).
- (b) Movable property is governed by the law of the natural person's domicile (*lex situs*).
- (c) Immovable property is governed by the law of the place where the immovable property is situated (*lex domicilii*).
- (d) Immovable property is governed by the law of law of the natural person's domicile (*lex situs*).

QUESTION 2 (direct questions) [10 marks in total]

Question 2.1 [maximum 3 marks] [3]

List any three proceedings that are **excluded** from the moratorium under business rescue proceedings imposed by section 133 of the Companies Act 71 of 2008.

The moratorium under business rescue proceedings do not apply to the following proceedings:

- Criminal proceedings that have been initiated against the company or any of its directors or officers;
- Proceedings against the company initiated by a regulatory authority in the exercise of its duties;
- Proceedings concerning any property or right over which the company exercises powers of a trustee;
- Proceedings initiated as set-off against claims made by the company 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.

Free residue account of an estate must be applied in the following order of preference:

- a. Funeral expenses
- b. Cost 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 136 of the Companies Act, 2008)	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?

In this particular instance, the BRP is appointed by Mapochs, provided such appointment has been consented to by the BRP. The appointment is made by filing a notice of appointment and publishing a copy of the same to each affected person within 5 days from filing of the notice. Following the grant of an order for compulsory business rescue, a court may appoint an interim BRP nominated by the applicant, subject to ratification of the holders of the majority of the independent creditors' voting rights at the first meeting of the creditors.

In the board resolution placing the company under business rescue.

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

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.

When a company becomes insolvent and is placed under liquidation proceedings, the company often has several contracts that are still in force. Such contracts are known as executory contracts, in which both parties to the contract have unperformed obligations which is to be performed at some future date. The South African liquidation regime offers a particular extent of protection to ensure a fair and equitable restitution for all the parties involved.

Treatment of executory contracts

In South African insolvency law, when a company is placed under liquidation, executory contracts may be affected. The treatment of executory contracts is not set out in legislation but is regulated by common law principles of law of contract. [1]

In case the debtor has already performed its part of the executory contract and whereof the other party's performance is still outstanding, the right to that performance is an asset of the debtor and thus the trustee may enforce it.

In case the performance of the debtor is pending the trustee may generally elect whether to abide [1] by or reject [1] the contract. The trustee must obtain the instructions of the general body of creditors [1] before exercising this election right. If the trustee elects to abide by the contract, the trustee is bound to perform [1] the contract and is entitled to receive the reciprocal performance from the other party. [1] If the trustee elected to reject the contract, the other party cannot claim specific performance [1] but can rely on remedies for breach of contract, such as damages. [1] Once the trustee exercises his election right, he cannot change his mind. [1]

The treatment of these contracts in liquidation proceedings can vary depending on the circumstances, but generally, they are classified into two categories: contracts that are terminated and contracts that are continued.

Terminated contracts: In certain cases, the liquidator may decide to terminate an executory contract, especially if it is not financially viable to continue it. The termination can result in the loss of rights and obligations under the contract for both parties.

Continued contracts: On the other hand, some executory contracts may be deemed necessary to continue for the liquidation process or for the benefit of the insolvent estate. These contracts might be transferred or assigned to another party or entity to fulfill the obligations.

Exceptions to the general rule:

There are exceptions to the treatment of executory contracts under liquidation proceedings in South Africa. For instance:

a. **Essential contracts:** Contracts that are crucial for the continuation of the business or the realization of the company's assets may be continued despite the liquidation commencement until the liquidation process is complete.

b. **Supervening impossibility:** If performance of an executory contract becomes impossible due to circumstances beyond the control of the parties, it may be terminated and the same need to be continued.

c. **Mutual agreement:** The parties involved can mutually agree to terminate or modify the executory contract during the liquidation process.

d. **Court's discretion:** In some cases, the court may exercise its discretion to determine the fate of an executory contract based on the interests of all parties involved.

In terms of sale of immovable property[1], wherein the company initiated transfer of immovable property before entering into liquidation, the trustee of the insolvent company must authorise transfer of ownership to the purchaser and no election right is available to trustee.

In terms of sale of movable property[1], if the insolvent company is liquidated before it pays purchase price, but after taking delivery, the seller has the right to reclaim the property.

If in case of instalment payment[1] outstanding from the insolvent company for purchase of a movable property, the seller will acquire a hypothec over the goods and the ownership will accrue to the company.

In case of lease agreement[1] being terminated by the trustee, the lessor shall have a concurrent claim against the estate for damages and he also obtains a hypothec over immovable property. If trustee does not terminate lease agreement within 3 months, it automatically gets terminated.

In terms of employment contracts[1], all are suspended upon the liquidation commencement. Unless continued employment has been agreed upon, all employment contracts terminate 45 days from the date of appointment of the trustee.

Answer contains aspects that are not applicable to South African insolvency law

QUESTION 4 (fact-based application-type question) [15 marks] [10] Good answer, but more detailed required

The directors of ABC (Pty) Ltd (the company) foresee the reasonable likelihood that the company will, within the next six months, be unable to pay its debts as they become due in the ordinary course of business, and will most likely reach a situation where its liabilities exceed its assets. The directors therefore elect to initiate business rescue proceedings and adopt the relevant board resolution, which is subsequently filed with the Companies and Intellectual Property Commission (CIPC). Donovan Jones is appointed as the company's business rescue practitioner. Various parties are affected by the company's decision. The following parties approach you as a collective seeking legal advice:

- (a) Charlie White, a successful businessman, lent the company ZAR 500 000 which the company failed to repay. He initiated proceedings against the company in the High Court to reclaim his money, and at the time that the company was placed under business rescue proceedings, the court proceedings were almost finalised. Charlie is unsure what the effect of business rescue will be on the money owed to him.
- (b) Rowena Gonzales has worked for the company for the last five years and she is concerned about the effect that business rescue will have on her employment contract.
- (c) Mario Miles leases office space to the company and he is concerned about the effect of the business rescue proceedings on the lease agreement with the company.
- (d) Trudy Pather is a shareholder of the company and is unsure whether she will lose her shareholding now that the company has been placed under business rescue.
- (e) Henry Jean is a director of the company and is unsure as to his position and role now that business rescue proceedings have commenced.

Write a single legal memorandum to all the above-mentioned persons wherein you explain their legal rights, and / or the potential outcome of their respective situations, taking into consideration that the company has been placed under business rescue. The memorandum should further make mention of any potential remedies at their disposal; any practical implications of their respective situations; and also include any considerations in respect of the business rescue plan that the business rescue practitioner needs to take cognisance of.

(a) Charlie White:

As a creditor who lent ZAR 500,000 to the company, Charlie White debt claim against ABC (Pty) Ltd is considered a pre-commencement obligation. With business rescue initiated, all legal proceedings against the company, including your court action, will be stayed until the business rescue process is concluded. During business rescue, his claim will be subject to the business rescue practitioner's evaluation and may be included in the business rescue plan.

Potential Outcome: The business rescue plan may propose a repayment arrangement or debt restructuring, which could affect the timing and amount of your repayment.

Remedy: Engage with the business rescue practitioner and participate in the business rescue proceedings to ensure your interests are considered. **Claim to be proved at first meeting**

(b) Rowena Gonzales:

As an employee of ABC (Pty) Ltd, Rowena Gonzales' employment contract is an executory contract, and it will continue during the business rescue process. The business rescue practitioner will review the company's employment contracts and may propose amendments or restructuring to ensure the company's viability.

Potential Outcome: Rowena Gonzales' employment may be affected by the business rescue plan, which could include changes to terms and conditions, retrenchment, or transfer to a new entity. **In terms of South African labour laws**

Discussion on ranking of salary due pre and post business rescue

Remedy: Engage with the business rescue practitioner and consult with a labour lawyer to protect Rowena Gonzales' rights during the process.

(c) Mario Miles:

As a lessor providing office space to ABC (Pty) Ltd, Mario Miles' lease agreement is also an executory contract. The business rescue practitioner will review all contracts and leases to determine their relevance to the restructuring process.

Potential Outcome: The business rescue plan may propose to either continue the lease or terminate it, depending on the company's needs and financial circumstances.

Remedy: Mario Miles must engage with the business rescue practitioner to understand the plan's impact on his lease agreement and explore potential negotiations.

- ***the business rescue practitioner maintains a discretion to suspend this agreement either partially, entirely or conditionally.***
- ***Mario may also cancel the agreement (Murry Cloete); may not cancel if practitioner has elected to suspend (Kythera); but in terms of reciprocity principle other court said may cancel (BP Southern Africa).***
- ***No concursus creditorum.***

- ***Practitioner needs to make a decision as the treatment of contracts need to be included in the business rescue plan***
- ***This is not an essential contract - there are no such contracts in business rescue***
- ***Ranking***

(d) Trudy Pather:

As a shareholder in ABC (Pty) Ltd, Trudy Pather's shareholding will not be directly affected by the business rescue proceedings. However, the value of your shares may be impacted by the restructuring or recapitalization of the company proposed in the business rescue plan.

Potential Outcome: The business rescue plan may propose a debt-for-equity swap or the issuance of new shares, diluting existing shareholders' ownership.

Remedy: Monitor the business rescue plan and engage with the business rescue practitioner to safeguard your interests as a shareholder.

- ***If the business rescue plan does alter the rights of any class of holders of the company's securities, the holders of these securities are called to a vote where the majority of the holders of the voting interest can approve the plan***

(e) Henry Jean:

As a director of the company, Henry Jean's powers and duties are temporarily suspended during the business rescue proceedings. The business rescue practitioner assumes control over the company's operations and management ***in substitution for the board. 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.***

Potential Outcome: Henry Jean's role and position may be redefined, or Henry Jean may be retained to assist the business rescue practitioner during the process.

Remedy: Collaborate with the business rescue practitioner, provide necessary information and support, and adhere to the duties and restrictions imposed during the proceedings.

Business Rescue Plan Considerations:

The business rescue practitioner must consider the interests of all affected parties, including creditors, employees, lessors, and shareholders, while formulating the business rescue plan. The plan should be reasonable and achievable, providing a fair and equitable solution to restore the company's financial health and continue its operations.

Practical Implications:

During the business rescue process, decisions and actions taken by the business rescue practitioner may impact all parties involved. It is crucial to stay informed, engage with the practitioner, and seek legal advice to protect each one's rights and interests.

- ***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 ***