



**SUMMATIVE (FORMAL) RESIT ASSESSMENT: MODULE 7D**

**SOUTH AFRICA**

**Commented [SL1]:** TOTAL = 37/50  
74%

This is the **summative (formal) resit assessment** for **Module 7D** of this course and must be submitted by all candidates who **have qualified for a resit assessment for Module 7D**.

**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: 202122-336.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, 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 **27 September 2021**. This assessment must be submitted to [David.Burdette@insol.org](mailto:David.Burdette@insol.org) via e-mail no later than 23:00 (11 pm) on **Monday 27 September 2021**.
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

## ANSWER ALL THE QUESTIONS

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

Commented [SL2]: SUB-TOTAL = 6

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

Commented [SL3]: 1

The following categories of claims in these respective amounts have been proved against an insolvent estate:

Secured claims:	ZAR 2,000,000
Statutory preferent claims:	ZAR 1,500,000
Concurrent claims:	ZAR 1,000,000

Choose the **correct statement**:

- (a) The total amount of unsecured claims against the estate is ZAR 1,000,000.
- (b) The total amount of unsecured claims against the estate is ZAR 2,500,000.**
- (c) The total amount of secured claims against the estate is ZAR 3,500,000.
- (d) The total amount of unsecured claims against the estate is ZAR 4,500,000.
- (e) None of the above is correct.

#### Question 1.2

Commented [SL4]: 1

Choose the **correct statement** in relation to impeachable dispositions and the powers of the officeholder to have dispositions sets aside –

- (a) A disposition not for value made by the company prior to being placed under liquidation may be set aside in terms of the provisions of section 26 of the Insolvency Act 24 of 1936.**
- (b) A disposition preferring one creditor above another made by the company prior to being placed under business may be set aside in terms of the provisions of section 29 of the Insolvency Act 24 of 1936.
- (c) A disposition with the intention to prefer one creditor above another made by the company prior to being placed under business may be set aside in terms of section 30 of the Insolvency Act 24 of 1936.
- (d) None of the above are correct.

**Question 1.3**

Commented [SL5]: 0

Choose the **correct option** in relation to the following statement: After sequestration, the assets of the insolvent vests in the Master until a business rescue practitioner is appointed.

- (a) The statement is correct.
- (b) The statement is incorrect, as the assets remain under the control of the insolvent until the officeholder is appointed.
- (c) The statement is incorrect as the officeholder in sequestration is a trustee.
- (d) Options (b) and (c) are correct.

**Question 1.4**

Commented [SL6]: 0

Which of the following does a debtor not have to prove when bringing an application for voluntary surrender:

- (i) That sequestration will be to the advantage of creditors.
- (ii) That there is reason to believe that sequestration will be to the advantage of creditors.
- (iii) That an act of insolvency was committed by the debtor.
- (iv) That there will be sufficient free residue to cover the costs of sequestration.

Choose the **correct answer**:

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

**Question 1.5**

Commented [SL7]: 0

In February 2021 Company X was placed in liquidation. The liquidator of Company X became aware of the fact that Company X disposed of property worth ZAR 12,000 to Company Z for an amount of ZAR 7,000 during September 2020. Directly after the disposition, Company X's liabilities exceeded its assets by ZAR 8,000. **If the disposition is set aside –**

- (a) Company Z will be required to return ZAR 12,000 to the liquidator of Company X.
- (b) Company Z will be required to return ZAR 8,000 to the liquidator of Company X.
- (c) Company Z will be required to return ZAR 7,000 to the liquidator of Company X.
- (d) Company Z will be required to return ZAR 5,000 to the liquidator of Company X.

**Question 1.6**

Commented [SL8]: 1

Which of the following is correct in relation to jurisdiction in insolvency related matters:

- (i) The High Court has exclusive jurisdiction in insolvency related matters.
- (ii) The High Court has exclusive jurisdiction to grand liquidation orders.
- (iii) The Insolvency Court has exclusive jurisdiction in insolvency related matters.
- (iv) A Magistrate's Court with jurisdiction may in certain instances hear matters related to the insolvent estate.

Choose the **correct answer**:

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

**Question 1.7**

Commented [SL9]: 1

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**

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Company A wishes to obtain funding to utilise as working capital in order to expand its exploration and mining enterprises. Company A has various subsidiaries, and Bank XYZ, as lender, requires Company A to provide some of its shares in its subsidiaries as security to the bank in order to secure the loan. This form of security is known as a –

- (a) Pledge.
- (b) Hypothec.
- (c) Cession in security of a debt (*in securitatem debiti*).
- (d) Special notarial bond.

**Question 1.9**

Commented [SL11]: 1

An insolvent debtor **may not** hold the following office, unless exemption has been granted by a court:

- (a) A trustee of an insolvent estate.
- (b) A member of the National Assembly.
- (c) A business rescue practitioner.
- (d) A director of a company.

**Question 1.10**

Commented [SL12]: 1

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 2 marks]**

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Briefly **differentiate between the commencement** of voluntary and compulsory business rescue proceedings.

Voluntary Business rescue proceedings are commenced by a board of a company, where the board adopts a resolution to initiate business rescue proceedings. The resolution passed is thereafter filed with the Companies and Intellectual Property Commission and the same takes effect. Such companies are required to tender grounds that there is reasonable prospect for the company to be rescued.

Compulsory Business rescue proceedings on the other hand is initiated by an affected person (e.g. creditor, shareholder) who files a business rescue proceedings application in court. The proceedings commence upon issuance of a court order.

**Question 2.2 [maximum 8 marks]**

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Briefly set out and explain the **threshold** for a company to enter business rescue proceedings.

For the company to enter into business rescue proceedings;

- i. The process must be commenced by either the board of directors of the company on its own volition or an affected person.

- ii. The process is available to companies which are either undergoing financial distress i.e. those that appear unable to pay their debts as and at when they fall due within the ensuing 6 months or will become insolvent in the 6 months thereafter.
- iii. That there is a likelihood of the business being salvaged should the business rescue proceedings be employed and continue trading as a going concern.
- iv. That in the case where companies have no chance to continue as a going concern, the use of business rescue proceedings will offer better outcomes to its creditors as opposed to the business going into immediate liquidation.
- v. Where the above objectives cannot be attained, the practitioner is required to apply to court for liquidation orders.

For a company to enter compulsory business rescue proceedings in South Africa it is required to either -

- a. Pass a special resolution resolving that it be wound up by the Court.
- b. Have commenced business before the Registrar certified that it was entitled to commence business.
- c. Have failed to commence its business within a year from its incorporation, or has suspended its business for a whole year.
- d. Number of members to have fallen below the statutory requirement. i.e. with regards to public companies, the number of members has been reduced below seven;
- e. Where seventy-five per cent of the issued share capital of the company has been lost or has become useless for the business of the company.
- f. The company is unable to pay its debts as described in section 345.
- g. In the case of an external company, that company is dissolved in the country in which it has been incorporated, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs.
- h. It appears to the Court that it is just and equitable that the company should be wound up.

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

ABC Limited conducts smelting operations for a local gold mine, which gold mine has recently sunk two new shafts. As a result thereof, the amount of gold ore extracted has increased significantly, and ABC Limited is not able to process all of the ore with the existing smelters that it has. The board of ABC Limited has taken the decision to apply for funding in order to build and install new smelters. ABC Limited's bank, XYZ Bank, has indicated its willingness to provide ABC Limited with the required funds, but subject to a significant security package. ABC Limited owns the following unencumbered property, or has the following available to provide as possible security: (i) the land on which the smelting operations are located; (ii) the existing freestanding and movable smelters; (iii) 100% shares in one of its subsidiaries, DEF Limited; and (iv) various business insurance policies.

#### Question 3.1 [maximum 10 marks]

Advise ABC Limited as to the various types of security that XYZ Bank may be willing to consider, based on the list of available items above. Your answer should also include any practical considerations that XYZ Bank would bear in mind when deciding what to take as security, as well as a brief description of each type of security to be taken.

The various types of security likely to be considered by the XYZ Bank include the land on which the smelting operations are located. The security over the land also holds any other

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immovable property that is within the jurisdiction of the land in question which can also be created by the mortgage bond. ABC Limited being the owner of the land and/or the immovable property will be required to execute a mortgage bond which would subsequently be registered against the title deed of the land, signed and endorsed by the registrar to give it validity.

Another type of security to be considered by XYZ Bank is the existing freestanding and movable smelters. Movable property can be classified into tangible and intangible movable property. The tangible properties can be handled and may include the machines, tools, equipment's and devices that are movable and are used for smelting the gold. The intangible movable properties on the other hand cannot be handled or touched and may include the shares, intellectual properties or even the book debts. The company heavily invests in smelting machines and tools to ensure the smooth running and operation of smelting gold and also invest in the intellectual properties which makes the ABC Limited outstanding in the gold market. For this reason, the bank is likely to target and consider the freestanding and movable smelters due to its value.

The bank may also consider taking the 100% shares in one of its subsidiaries DEF Limited as security. This means that that incase the ABC Limited is unable to pay its debt, the bank will take possession of/or own DEF limited. XYZ Bank can only consider taking up the 100% shares of DEF Limited after analyzing ABC Limited's current books of accounts, the trend and establish the revenue, costs and the profit margin of the company over the last few years. If DEF Limited makes high or average profit margin then the bank will definitely consider having it as one of its security but if DEF Limited is not making profits and is struggling to secure a position in the market share then the bank will not consider it as one of its security.

Other different types of securities that may be considered by XYZ bank include:

**Pledge** - One of the most common forms of security which is granted over tangible movable properties. It is normally established when both parties enters into security cession agreement which is always in favor of the lender as security of a debt. This type of security can be used as a security to both intangible and tangible movable property. The borrower, ABC Limited still remains with the title to the movable property, however, subject to the banks security interest.

**Shares** - In South Africa, security can be taken over shares in companies by the banks. The share in a private company is issued a certificated form while those in public companies are issued un-certificated form. Companies in South African take security over certificated shares by way of pledge and the un-certificated shares by way of cession and notation agreement in pledgers security account.

**Landlord's hypothec** – This is an encumbrance which gives the bank a security interest on any movable property of the company which is on the leased property. The lessor of the leased property is said to have a hypothec whenever any rental payment in respect of a leased immovable property is due and payable but remains unpaid. The hypothec gives the right of security and permits execution of the lessee's property so as to satisfy payment of the rental arrears.

**Security over immovable properties** - In some cases the law justifies for the security over plant, machinery and equipment which may be caught by mortgage bond over the land since by extent such assets are considered to be sufficiently attached to the mortgaged land and were envisioned to be annexed permanently to the land. In such circumstances, the assets would be classified under immovable property. On the other hand, the law of notarial bond under South African can be used in circumstances where the machinery and plants not constituting immovable property are taken by way of mortgage. A special notarial bond can be described as the mortgage which is in favor of the creditor and acts as security for a debt. Special notarial bond should be registered at the deeds registry.

**Question 3.2 [maximum 5 marks]**

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For this question 3.2 only, assume that XYZ Bank has provided ABC Limited with the required funding, and has taken security as per your answer in question 3.1 above. Due to a downswing in the economy and a global decrease in the demand for gold, ABC Limited is unable to repay its obligation towards XYZ Bank. XYZ Bank has brought a liquidation application in the High Court, and a final liquidation order has been granted against ABC Limited. How would XYZ Bank go about enforcing its security?

*(Please note that the guidance text does not contain comprehensive information on enforcement in relation to all of the applicable forms of security in this set of facts, as it falls outside of the scope of this certificate. Students are simply required to answer this question with reference to the available material, and no other further research is required.)*

Once the XYZ Bank has received the liquidation order, they will liaise with the liquidator appointed to realize the assets and distribute as per the priority rules and the proved creditor claims. Being a secured creditor, the bank's chances of recovery are high as the proceeds tend to be ring fenced for their benefit save for certain costs. In this circumstance, they are required to inform the practitioner of the security held and provide details of the security held then continue to redeem their security. They may also elect to deliver up the property and prove against the insolvent estate. However, where they are an unsecured creditor, the liquidator deals with the assets as one.

The XYZ Bank will wait for the liquidator to lodge their first liquidations and distribution account within the first six months of the appointment date. If the liquidator is able to sell all the assets and no unresolved issues arise, then the account could be the first and final. Once account has been approved by the chair, the liquidator is given permission to advertise to the public that the account will lie open for inspection for a period of not less than 14 days. The XYZ Bank may inspect the account during this period and lodge any objections. If the bank does not have any objection, then the chair will proceed to confirm the account within few days of the expiry of the advert and the liquidator are given notice of the confirmation of the account through the South African Gazette.

Additionally, the bank as the aggrieved party may force the company to undergo a compulsory business rescue proceeding under either the objective of salvaging the business to continue trading as a going concern or to use of business rescue proceedings to offer better outcomes to its creditors

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

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Money Problems NZ Limited (Money Problems NZ) is a company duly registered in terms of New Zealand company law. Money Problems SA Limited (Money Problems SA) is registered in South Africa as an external company and is a subsidiary of Money Problems NZ. Money Problems NZ was placed under liquidation in New Zealand on 31 August 2020 as a result of inability to pay its debts. Shortly thereafter Mrs B was appointed as the liquidator of Money Problems NZ. On 17 October 2020 a creditor of Money Problems SA made it clear that he intended approaching the High Court in South Africa for an order to wind-up Money Problems SA in terms of the Companies Act 61 of 1973 on the ground that it is unable to pay its debts. Mrs B has not yet approached the High Court in South Africa for recognition. The affairs of Money Problems NZ seem to be rather convoluted and only on 10 October 2020 did Mrs B come to learn that Money Problems NZ has assets in South Africa. Mrs B plans to apply to the South African High Court for recognition in due course.

You are required to draft an opinion addressed to Mrs B on the possible conclusions that may be reached by the South African High Court under the present circumstances. Your opinion should include specific reference to, among other things, –

- (a) whether the court might recognise the foreign proceedings or the foreign officeholder;
- (b) whether the court might order the liquidation of Money Problems SA given the current liquidation of Money Problems NZ;
- (c) factors that the court will take into consideration when drawing a conclusion; and
- (d) the content of a possible declaratory order that the court may make.

If you are of the opinion that you need additional facts in order to answer the question effectively, please indicate what facts you would require and how these facts would affect your answer.

- a. Whether the court might recognise the foreign proceedings or the foreign officeholder - According to the South African law, the liquidator from a foreign country (foreign representative) must first apply for recognition and assistance from the local high court before dealing with any assets located in South Africa. A foreign representative who comes to South Africa is not allowed to deal with any properties belonging to a debtor nor are they allowed to defend actions for the company under provisional or impose the final liquidation unless they have received approval from the South African court for recognition. It is the discretion of the high court to decide whether to grant recognition of a foreign representative which is absolute. The principles of comity, convenience and equity are applied in the South African court in exercising their discretion in recognizing the foreigner. When the recognition is issued, the foreign representative is expected to rely on domestic South African law in carrying out their duties. A foreign company which has been registered in South Africa may be wound up as if it is independent which makes it possible for the company to be subjected to simultaneous, concurrent winding-up processes. Conversely, the cessation of foreign winding-up proceedings does not necessarily affect the South African process, since the respective liquidators deal independently with the assets and liabilities of the company in the different countries. It is worth noting that the South African jurisdiction and courts tend to recognise the foreign representative/ officeholder and not the foreign proceedings as is the case with most jurisdictions.
- b. Whether the court might order the liquidation of Money Problems SA given the current liquidation of Money Problems NZ - The high court in South African may agree to order the liquidation of money problems SA only if the foreign liquidators have applied for recognition of the foreign proceedings in the high court, which must be fully supported by the relevant documentation, evidence and statements of foreign proceedings that relate to the debtor. Once the recognition is granted, the foreigner is able to participate in local insolvency proceedings and can also intervene in any other legal proceedings that the debtors may be involved in. Once the foreign insolvency proceedings are recognized, the foreign liquidator acquires the right to initiate legal action so as to set aside any disposition that might be existing to a South African representative. Cross border insolvency act in South Africa has introduced the principles of designation and reciprocity, which follows a dual approach in recognizing foreign liquidation orders. Any representatives from foreign countries and the proceedings will follow the South African procedures and be subjected to the Cross-Border Insolvency Act. The current South African cross-border insolvency law is strictly governed by common law principles until the day that the Minister of Justice will designate the foreign countries to which it will apply.

Additionally, the *lex domicilii* and *lex situs* would determine whether or not the debtor company is divested of its moveable and immoveable assets respectively.

- c. Factors that the court will take into consideration when drawing a conclusion -
- i. The just treatment of all interests and holders of claim. The court will aim to protect the creditors against any prejudice and inconvenience in the processing of claims in such foreign proceeding.
  - ii. The court will also ensure that due diligence is conducted to prevent any preferential or fraudulent disposition of property. This means that Mrs. B will have to present before the court the legal documentation of ownership or contract of agreement with the debtors.
  - iii. Whether it is equitable and convenient if the insolvency is carried out elsewhere, should a party be found not to be subject to the jurisdiction of the South African Courts.
  - iv. The court will consider the location of the debtor's primary assets and the impact of the liquidation to the creditors and economy.
  - v. The security that the foreign liquidators can afford to the satisfaction of the Master of the High Court.
  - vi. The practical arrangements and supervision by the Master in regards to the administration of the order and the submission of estate accounts.
  - vii. Whether a single proceeding is more beneficial
  - viii. Principles of comity amongst the states
- d. The content of a possible declaratory order that the court may make – this order would only come into effect where the recognition of the foreign representative is granted. This order bestows upon the officeholder the power to administer assets (sell, realize and distribute proceeds) and further, grant him other rights to deal with claims (admitting, rejecting), to deal with creditors (convene meetings) etc; subject to local requirements. The rights and privileges granted by these orders apply as though they were granted on the date of the recognition. It is worth noting that the applicant seeking such order is required by the Court to give security for proper performance.

**\* End of Assessment \***