



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

SOUTH AFRICA

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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: 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 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 2022**. The assessment submission portal will close at **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. 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 **8 pages**.

ANSWER ALL THE QUESTIONS

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

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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

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

Choose the **correct statement** in relation to impeachable dispositions and the powers of the officeholder to have dispositions set 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

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

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

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

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

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

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

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

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]

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

[The commencement of voluntary business rescue is triggered by the board of a company upon adoption of a resolution to this effect and the filing of such a resolution with the Companies and Intellectual Property Commission. (CIPC) The board must have reasonable grounds to believe that such a company can be rescued. On the other hand, compulsory business rescue is ordered by the court after an application by any affected person.]

Question 2.2 [maximum 8 marks]

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

[A company can enter business rescue when the company is in financial distress and there is reasonable prospect that such a company can be revived again through business rescue. A company can equally enter business rescue when there is no such prospect of reviving the company but maintaining it as a going concern would be beneficial to creditors and other concerned parties than would be immediate liquidation.]

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

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Could have discussed meaning of financial distress; reasonable grounds of the board; application for liquidation when practitioner no longer has reasonable grounds.

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.

[Security is defined as that property of the insolvent's estate over which a creditor has a preferent right. Various types of securities can be created depending on the type of property available to be placed as collateral.

Considering the fact that ABC limited has a list of different properties to be used as collateral, different types of securities can be created. The first would be a mortgage bond hypothecating the smelting operations land. In this regard, XYZ bank would have to ensure that the mortgage bond is registered against the title deed of the land at the Deeds office. The bond would specifically indicate the debt and amount for which the land is security for and such land cannot be transferred without prior cancellation of the registered bond.

The existing freestanding and movable smelters constitute movable property and a notarial bond is requisite to create security in respect of movable property. Such a bond equally needs to be registered at the Deeds office in terms of section 1 of the Security by Means of Movable Property Act on or after 7 May 1993 or it should be registered in terms of section 1 of Notarial Bonds Act. Registration at the Deeds office is of the effect that the movable property is deemed to have been pledged to the creditor as if physically delivered to him. ABC Bank must ensure that such a bond is a special and not a general bond as only special bond holders are considered as secured creditors during insolvency vis a vis general bond holder.

Shares owned by ABC in its subsidiary can also be used as collateral for the loan through the creation of a form of security over them called *Securitate debiti* or "cession as security for debt". This is the type of security that can be created with movable incorporeal property. There is no registration requirement from this form of security to be valid but XYZ Bank has to ensure that the cession is an out-and-out cession in order to ease retrocession in case of insolvency proceedings. The various insurance policies subscribed to by ABC are equally movable incorporeal property that obeys to the same mechanism of security creation as with company shares.]

Question 3.2 [maximum 5 marks]

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Could have included discussion on unpractical nature of pledge.

Commented [INS 16]: 4.
Could have included discussion on out and out cession of shares.

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.)

[Upon the granting of the sequestration order by the court, the estate of ABC will rest with the Master and subsequently with the designated trustee and this includes all movable and immovable property of ABC regardless of the fact that some may be encumbered or not. However, the proceeds of the property under security are ringfenced in a way that the proceeds from them are destined to pay the secured creditors subject to certain deductions for the cost of sequestration.

Regarding the movable property held by XYZ, they would have to inform the Master or Trustee (where an appointment has been made) in writing with supporting affidavit of the movable property held by the bank before the second meeting of creditors. As the case may be, XYZ may be entitled to realise some of the movable property by itself as per section 44 of the Insolvency Act or deliver the movable property to the Trustee and still prove its claim over the property.

Regarding immovable property, XYZ may not realise the property by itself but it has to value the security as it proves its claim over the property. The Trustee may take over the property if authorised by creditors and if he fails to do so, XYZ Bank may realise the immovable property itself for the benefit of all creditors according to their respective claims.]

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

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;

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Could have included discussion in re comity, convenience and equity; Sackstein v Proudfoot

- (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.

Mrs B
Liquidator,
Money Problems NZ Limited

Mrs,

Re: OPINION ON THE RECOGNITION OF FOREIGN INSOLVENCY PROCEEDING IN SOUTH AFRICA

1 BACKGROUND

- 1.1. Money Problems NZ is a company registered in New Zealand with a subsidiary in South Africa called Money Problems SA registered as an external company.
- 1.2. Money Problem NZ has been placed under liquidation in New Zealand with Mrs B as appointed liquidator.
- 1.3. Mrs B later on discovers the Money Problems NZ has assets in South Africa and seeks to approach the authorities for recognition.
- 1.4. In the meantime, a South African creditor of Money Problems SA seeks to approach the High Court for a winding up order against Money Problems SA for not being able to pay its debts.
- 1.5. This opinion is thus intended to offer legal advice to Mrs B on the way forward in South Africa.

2. Queries

- 2.1 Whether the court might recognise the foreign proceeding or the foreign officeholder.
- 2.2 Whether the court might order the liquidation of Money Problem SA given the current liquidation of Money Problem NZ.
- 2.3 Factors that the court will take into consideration when drawing up a conclusion.
- 2.4 The content of a possible declaratory order that the court might make

3. Response to queries

- 3.1 Response to query one

As opposed to what obtains in many other jurisdictions, recognition in South Africa is given to the foreign officeholder rather than to the foreign proceeding. In this regard, an application would have to be made to the High Court and the Court would publish the application calling on anyone seeking to oppose the recognition to manifest their concerns. The recognition order when granted is accompanied by measures to ensure the equitable management of the estate and the protection of local creditors.

3.2 Response to query two

Generally, a foreign bankruptcy order has no influence on proceedings in South Africa but it is generally considered desirable to have a single proceeding. The courts have had to set aside a local winding order upon application of a foreign officeholder where the local applicant failed to disclose that it was incorporated in a country where it had already been placed in voluntary liquidation. It is more or less a matter of the discretion of the court guided by certain factors to recognise a foreign proceeding or not. In the case of *Lehane No v Lagoon beach hotel*, the foreign office holder was empowered to deal with property in South Africa after providing security to the satisfaction of the Master.

3.3 Response to query three

In drawing a conclusion whether to recognise a foreign proceeding or not, the court takes into consideration the following factors:

- a. Equitable and convenient if the insolvent is resident outside South Africa.
Should the court find out that it would be just and equitable to recognise a foreign proceeding, they would readily do so if the insolvent is resident outside South Africa.
- b. Preference for a single proceeding directed by court of domicile:
Several cases demonstrate the preference for a single proceeding directed by the court of domicile of the insolvent. If the insolvent has no property out of South Africa and the lone property is immovable in South Africa, then preference would go for South African proceeding. A local winding order would be refused if a single liquidation order would be more convenient and the interest of local creditors equally protected. In the case of *Ward v Smith*: In *re Gurr v Zambia Airways Corp Ltd* the court expressed a preference for a single concursus creditorium but refused recognition because recognition application was not made timeously.
- c. Assets in South Africa not a prerequisite for recognition:
The recognition can still be granted even if the insolvent has no asset in South Africa as was the case in *Moolman v Builders and Developers* even though the insolvent company did not have assets in South Africa.

3.4 Response to query four

The declaratory order that the court might make would be a recognition of the officeholder's entitlement subject to local requirements, to administer the assets as if they were in the relevant foreign jurisdiction. The declaration would contain the different prerogatives of the different stakeholders in the insolvency process regarding:

- a. Meeting of creditors
- b. Proof, admission and rejection of claims
- c. Sale of assets

- d. Plans of distribution of proceeds
- e. The rights and duties of trustee or liquidator concerning the above matters.

*** End of Assessment ***