



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.

[Voluntary business rescue proceedings is commenced by the board of a company upon the adoption of a resolution to that effect and the proceedings become effective once that resolution has been filed with the Companies and Intellectual Property Commission (CIPC).¹ Upon adopting this resolution, the board of a company appears to be a reasonable prospect of rescuing the company.² A resolution contemplated above (a) may not be adopted if liquidation proceedings have been initiated by or against the company; and (b) has no force

¹ See, South Africa Companies Act 2008, s 129. See also *Mouton v Park 2000 Development 11 (Pty) Ltd and Others and a Related Matter 2019 (6) SA 105 (WCC)* where the Court distinguished between the words "commenced" and "begin" in relation to winding-up provisions, as opposed to the word "initiated" in s 129(2)(a).

² *Idem*, s 129(1)(b). See also Guidance Text, Module 7D, p 42. "Reasonable prospect" means something less is required than that the recovery should be a reasonable probability but would rather indicate a reasonable possibility (*Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami)(Pty) Ltd* [2013] Jol 30498 (SCA)). Also see *Newcity Group v Allan David Pellow NO (577/2013) [2014] ZASCA 162 (1 October 2014)* and Joubert, "Reasonable Possibility" versus 'reasonable prospect': Did business succeed in creating a better test than Judicial management?" 2013 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg/ Journal of Contemporary Roman-Dutch Law (THRHR)* 550.

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or effect until it has been filed.³ Within five business days after a company has adopted and filed a resolution above, or such longer time as the commission, on application by the company, may allow, the company must- (a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice a sworn statement of the facts relevant to the grounds on which the board resolution was founded; and (b) appoint a business rescue practitioner who satisfies the requirement of section 138, and who has consented in writing to accept the appointment.⁴ However, after appointing a practitioner as required by subsection(3)(b), a company must- (a) file a notice of the appointment of a practitioner within two business days after making the appointment; and (b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.⁵ If a company fails to comply with any provision of subsection (3) or (4) of section 129- (a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and (b) the company may not file a further resolution contemplated in subsection (1) of section 129 for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an *ex parte* application, approves the company filing a further resolution.⁶ A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed in terms of subsection (5), or until the business rescue proceedings have ended as determined in accordance with section 132(2).⁷

A compulsory business rescue on the other hand, is initiated by a court order after an application is brought by an affected person.⁸ An "affected person" is a shareholder or creditor of the company, any registered trade union representing employees of the company and any employees not represented by a trade union as defined by the Act.⁹ An applicant in a compulsory business rescue, must serve a copy of the application on the company and the commission, and notify each affected person of the application in the prescribed manner.¹⁰ Each affected person has a right to participate in the hearing of an application in terms of this section.¹¹ After considering an application in terms of subsection (1), the court may make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that the company is financially distressed, the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; or dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.¹² If the court makes an order in terms of subsection (4) (a), the court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147.¹³ If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection(1), the application will suspend those liquidation proceedings until, the court has

³ Idem, s 129(2)(a) and (b).

⁴ Idem, s 129(3)(a) and (b).

⁵ Idem, s 129(4).

⁶ Idem, s 129(5).

⁷ Idem, s 129(6).

⁸ Idem, s 131. See also Guidance Text, *ibid*.

⁹ Idem, s 128(1)(a).

¹⁰ Idem, s 131(2).

¹¹ Idem, 131(3).

¹² Idem, s 131(4).

¹³ Idem, s 131(5).

adjudicated upon the application, or the business rescue proceedings end, if the court makes the order applied for.^{14]}

Question 2.2 [maximum 8 marks]

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

[The threshold for a company to enter business rescue proceedings are;

- (1) The commencement of the business rescue proceedings;
- (2) Appointment of the business rescue practitioner;
- (3) Moratorium (stay);
- (4) Post commencement finance;
- (5) Claims by Creditors;
- (6) Business rescue plan.¹⁵

The Companies Act No. 71 2008, defined "business rescue" to mean proceedings to facilitate the rehabilitation of a company that is "financially distressed", which in reference to a particular company at any particular time, means that-

- (i) It appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or
- (ii) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.¹⁶

Upon determination that the company is financially distressed, the company's board may commence the proceedings by resolving that the company voluntarily begin business rescue proceedings and place the company under supervision if the board has reasonable grounds to believe that the company is financially distressed and there appears to be a reasonable prospect of rescuing the company.¹⁷ Further, the company must satisfy the procedural requirements set out in section 129 of the Companies Act. The commencement can be a voluntary one or a compulsory one.

Voluntary business rescue is initiated by the board of a company upon the adoption of a resolution to this effect and the proceedings become effective once this resolution has been filed with the Companies and Intellectual Property Commission (CIPC).¹⁸ Upon adopting this resolution, the board of a company must also have reasonable grounds to believe that there

¹⁴ Idem, s 131(6).

¹⁵ This threshold is however in no sacrosanct order.

¹⁶ See, Companies Act 2008, s 128(b).

¹⁷ Idem, s 129(1)(a) and (b).

¹⁸ See, Guidance Text, p 42. See also Mouton v Park 2000 Development 11 (Pty) Ltd and Others and a Related Matter 2019(6) SA 105 (WCC) where the Court distinguished between the words "commenced" and "begin" in relation to winding-up provisions, as opposed to the word "initiated" in s 129(2)(a).

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Could have discussed separate goals of BR; application for liquidation when practitioner no longer has reasonable grounds.

appears to be a reasonable prospect of rescuing the company.¹⁹ Compulsory business rescue can also be initiated by a court order after an application is brought by an affected person.²⁰

However, within five business days after filing a resolution to commence voluntary business rescue with the CIPC, a company has to appoint a business rescue practitioner who satisfies the requirements for appointment and who has consented in writing to such appointment.²¹ Within two days of this appointment, the company must file a notice of appointment and publish a copy of this notice to each affected person within five days of filing the notice.²² Upon granting an Order for compulsory business rescue, a court may appoint an interim business rescue practitioner nominated by the applicant, subject to ratification of the holders of the majority of independent creditors' voting rights at the first meeting of creditors.²³

Similarly, the business rescue proceedings result in a moratorium on legal proceedings against the company. The Moratorium is inclusive of enforcement action against the company, or in relation to any property belonging to the company, or lawfully in its possession. The business rescue practitioner or the court may however grant permission to lift the moratorium in appropriate cases.²⁴ More so, to the extent that the company is liable as a debtor which includes its liability as a surety, the suretyship may not be enforced against the company unless the court grants permission on the grounds that it is just and equitable to do so.²⁵ The Moratorium however under section 133(1) exempt or does not apply to:

- (a) Criminal proceedings against the company or any of its directors or officers;²⁶
- (b) Proceedings against the company by a regulatory authority in the execution of its duties (the authority may continue with the proceedings after written notification to the business rescue practitioner);²⁷
- (c) Proceedings concerning any property or right over which the company exercises the powers of a trustee;²⁸ and
- (d) Proceedings instituted as a set off against any claim made by the Company itself in any legal proceedings.²⁹

¹⁹ *Idem*. See also *idem*, s 129(1)(b). "Reasonable prospect" means something less is required than that the recovery should be a reasonable probability but would rather indicate a reasonable possibility (*Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2013] JOL 30498 (SCA)). Also see, *Newcity Group v Allan David Pellow NO* (577/2013) [2014] ZASCA 162 (1 October 2014) and *Joubert*, "'Reasonable Possibility' versus 'Reasonable Prospect': Did business rescue succeed in creating a better test than judicial management?" 2013 *Tydskrif Vir Hedendaagse Romeins-Hollandse Reg/Journal of contemporary Roman-Dutch Law* (THRHR) 550.

²⁰ See, s 131 of the Companies Act. Section 128(1)(a) defined an "affected person" as a shareholder or creditor of the company, a registered trade union representing employees of the company and any employees not represented by a trade union (as defined in s. 138(a) of the Companies Act 2008).

²¹ See *ibid*, s 138 and s 129(3)(b). See also *Guidance Text*, p 44.

²² *Idem*, s 129(4).

²³ *Idem*, s 131(5). An "independent creditor" is a creditor of the company (including an employee) that is not related to the company, a director, or the business rescue practitioner (as defined in s 138(g) of the Companies Act 2008) See also *Guidance Text*, *ibid*.

²⁴ *Idem*, s 131(1).

²⁵ *Idem*, s 133(2). See *Hitachi Construction Machinery South Africa Co (Pty) Ltd v Botes and Another* (205/2018) [2019] ZANHC 7 (15 March, 2019) where the court held that the liability of a surety, however, is unaffected by the business rescue of the principal debtor.

²⁶ *Idem*, s 133(1)(d).

²⁷ *Idem*, s 133(f).

²⁸ *Idem*, s 133(1)(e). See also, *Afrimat Iron Ore (Pty) Ltd v Timasani (Pty) Ltd* (in business rescue) and another (2019) JOL 41473 (GP).

²⁹ *Idem*, s 133(1)(c).

It has however been decided recently that the moratorium does not preclude a creditor from cancelling an executory contract after the debtor company has been placed under business rescue.³⁰

Another is the post-commencement finance in the business rescue proceedings. During the proceedings, a company may obtain financing, secured if necessary, by any of the company's assets which are not otherwise encumbered.³¹ Such creditors will be paid after costs related to the business rescue proceedings and claims related to employment arising during the rescue proceedings.³² The order of preference is;

- (a) Business rescue practitioner's remuneration and other expenses;³³
- (b) Remuneration, reimbursement for expenses or other amounts of money relating to employment which becomes due and payable by a company to an employee during the company's business rescue proceedings;³⁴
- (c) Claims for financing obtained during business rescue (first secured claims in the Order in which they were incurred, in preference over all unsecured claims against the company;³⁵
- (d) Employees for claims which became due before commencement of the business rescue proceedings;³⁶ and
- (e) Preference provided for in the business rescue proposals.³⁷

Regarding claims by creditors, there is a clear distinction between pre- and post-commencement claims in business rescue proceedings. Only pre-commencement claims are part of the business rescue plan. Pre-commencement claims are however set out in legislation. The business rescue practitioner may receive proof of claims by creditors at the first meeting of creditors.³⁸ There is however an absence of guidelines for the administration of claims in business rescue proceedings, and this has resulted to uncertainty.³⁹ The treatment of the claim however does not seem to depend on whether or not a claim has been proved, it

³⁰ See Guidance Text, p 44 n 329: Cloete Murray NO & Another v First Rand Bank Ltd [2015] ZASCA 39 (26 March, 2015).

³¹ *Idem*, s 135(2).

³² See *idem*, s 135. See also Murgatroyd v Vanden Heever and others NNO 2015 (2) SA 514 (GT), Diener NO v Ministry of Justice (926/2016) [2017] ZASCA 180 (1 December 2017); Diener NO v Minister of Justice and Correctional Service and Others (CCT03/18) [2018] ZACC 48 (29 November 2018) and Diener NO v Minister of Justice and Correctional Services and Others 2019(2) BCLR 214 (CC). It was held that the "super preference" interpretation contended by Diener undoubtedly favours business rescue practitioners and does not achieve a balance of the rights of all interested parties. Also see Nedbank Limited v Master of the High Court and another (43581/16) [2019] ZAGP JHC 393 (31 October 2019) where the position in the Diener cases was followed and applied.

³³ *Idem*, s 135(1).

³⁴ *Ibid* guidance text.

³⁵ *Ibid*, ss 135(2) and 135(3)(a) and (b).

³⁶ *Idem*, s 144(2).

³⁷ The business rescue plan is to set out full details of the creditors and their claims- whether they are secured, preferent or concurrent in terms of the Insolvency Act, including the amount they would receive in liquidation (s 150(2)(a)(ii) and (iii) of the Companies Act 2008). This will enable the creditors to take an informed decision on the plan. See also, The Commissioner, South African Revenue Service v Beginsel NO and Others 2013(1) SA 307 (WCC). This however has no effect on the ranking under business rescue. The Commissioner for Inland Revenue and other creditors who enjoy a preference in terms of ss 98 to 102 of the Insolvency Act do not enjoy a preference during business rescue proceedings (The Commissioner, South African Revenue Service v Beginsel NO and Others 2013(1) SA 307 (WCC)). See also Guidance Text, p 46 n 350.

³⁸ *Idem*, s 147(1)(a)(ii).

³⁹ See Van der Linde, "National Report for South Africa" in Faber, Vermunt, Kilborn, Richter and Tirado (eds) Ranking and Priority of Creditors (Oxford University Press 2016) 441 444.

may be beneficial to assist the business rescue practitioner in establishing a list of the company's debts and resolve possible disputes regarding claims.⁴⁰

Further, is the business rescue plan. The business rescue practitioner must, after consulting with the creditors, other affected persons, and the management of the company, prepare a business rescue plan for consideration and possible adoption at a meeting convened for this purpose.⁴¹ The business rescue plan is required to contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan,⁴² and must be published within 25 days after the appointment of the business rescue practitioner.⁴³ The plan is adopted on a preliminary basis by creditors (subject to approval by holders of securities if their interests are affected) if it is supported by 75% of voting interests and 50% of independent creditor's voting interest (if any).⁴⁴ If however the plan does not alter the rights of holders of any class of the company's securities, preliminary approval constitutes final approval. But if the 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.⁴⁵

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 estimation of the return to that person, or those persons, if the company were to be liquidated.⁴⁶ The adopted business rescue plan shall be binding on the company, on each creditor of the company and every holder of the company's securities, whether or not such a person was present at the meeting, voting in favour of the adoption of the plan, or in the case of creditors proving their claims against the company.⁴⁷ A so-called "cramdown" thus occurs where creditors are forced to accept the plan even against their wishes. The rescue may thus proceed despite objections.⁴⁸

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.

⁴⁰ Ibid, s 154(4). See also idem, 445.

⁴¹ Idem, s 150(1). See also Hlumisa Investment Holdings (RF) Limited and another v Van der Merwe NO and others [2016] JOL 34326 (GP) Para 22 and 23.

⁴² Idem, a 152(2).

⁴³ Idem, s 150(5). The court or the holders of the majority of the creditors' voting interest may also allow for a longer period than 25 days.

⁴⁴ Idem, s 152(2). See also s 154(5).

⁴⁵ Idem, s 152(3)(c).

⁴⁶ See African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd and Others 2013(6) SA 471 (GNP) and DH Brothers Industries (Pty) Ltd v Gribnitz NO and Others 2014 (1) SA 103 (KZP).

⁴⁷ Idem, s 152 (4).

⁴⁸ See generally, Guidance Text, pages 42 to 47.

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.

[XYZ Bank may be willing to consider the following securities to be explained hereunder. Under the Insolvency Act of South Africa, "security" is defined as "in relation to the claim of a creditor of an insolvent estate, means property of that estate over which the creditor has a preferent right by virtue of any special mortgage, Landlord's legal hypothec, pledge or right of retention"⁴⁹. The Act also defined "preference", "in relation to any claim against an insolvent estate, mean the right to payment of that claim out of the assets of the estate in preference to other claims, and "preferent" has a corresponding meaning".⁵⁰ By these definitions, only real security grants preference in terms of the Insolvency Act of South Africa. Furthermore, even if the Insolvency Act, did not define who a secured creditor is, it is clear however that a secured creditor is a creditor who enjoys security for his claim.

By the available and relevant facts therefore, XYZ Bank, may be willing to become a secured creditor entitled to enjoy security for the required funding by ABC Limited and in the circumstances may be willing to consider the following types of security based on the list of available items:

- (1) A Special Mortgage. This type of security will be considered on item (i) of the relevant facts. Item (i) is the land on which the smelting operation are located. The said land constitutes a security⁵¹ which qualify as an immovable property upon which a special mortgage can be created.⁵² A special mortgage has been said to include a mortgage bond hypothecating any immovable property.⁵³ In order to constitute a right of security over immovable property, it is necessary for a mortgage bond to be registered against the title deed of the property in the Deeds Office, which office is responsible for the registration, management and maintenance of the property registry in South Africa.⁵⁴ The Mortgage Bond will specifically indicate the debt that the property is security for including the amount of debt secured.⁵⁵ Ownership of the immovable property specifically hypothecated may not be transferred without the bond being cancelled or the written consent of the mortgage bondholder (the secured creditor).⁵⁶
- (2) A Special Notarial Bond. This nature of security can be considered by XYZ Bank on item (ii) of the relevant fact. Item (ii) of the fact is, the existing freestanding and movable smelters. Special Notarial Bond is a form of special mortgage also known as notarial mortgage bond hypothecating specially described movable property in terms of section 1 of the Security by Means of Movable Property Act 57 of 1993. It is created over corporeal movable property such as machinery or equipment as in the list of available items in item (ii) of the relevant facts. In order to constitute a right of security over movable property a notarial bond needs to be registered in the Deeds Office in terms of either section 1 of the security by means of Movable Property Act on or after 7 May, 1993, or it should have been registered in terms of section 1 of the Notarial Bonds

⁴⁹ Insolvency Act, *ibid*, s 2. See also, Guidance Text *ibid*, p 7.

⁵⁰ *Idem*.

⁵¹ *Idem*, s 2.

⁵² Guidance Text, p 8.

⁵³ *Idem*. See also the "Notarial Bonds (Natal) Act.

⁵⁴ *Idem*.

⁵⁵ *Idem*.

⁵⁶ See, Deed Registry Act 1937, s 56(1). See also, *Idem*.

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Could have included discussion on unpractical nature of pledge in re smelters.

(Natal) Act prior to this date.⁵⁷ A notarial bond registered in terms of the security by Means of Movable Property Act hypothecates corporeal movable property specified and described in the bond in a manner that makes it readily recognisable.⁵⁸ The effect of the registration of the bond at the Deeds Office is that the property is deemed to have been pledged to the mortgagee (XYZ Bank, the secured creditor) as if it had been expressly pledged and delivered to the creditor.⁵⁹ It should however, be noted, that a notarial bond may also be registered to hypothecate movable property generally.⁶⁰ Such movable property is described generally in the bond and registered in the Deed Office.⁶¹ In Insolvency proceedings, this bond does not constitute a “special mortgage” in terms of section 2 of the Insolvency Act and the holder of such bond is not a secured creditor.⁶² The holder of such a bond does however have preferent claim in terms of the Insolvency Act.⁶³

- (3) A Pledge. This type of security can be considered on items (iii) and (iv) of the relevant facts i.e, the 100% shares in one of its subsidiaries, DEF Limited and the various business insurance policies, respectively. A pledge is created by agreement between the debtor and the creditor and there is no registration requirement for its validity. It is created by delivery of the property concerned to the creditor and the pledge remains effective for as long as the creditor remains in possession of the property.⁶⁴ A right created in a pledge is over movable corporeal property and the pledge object will remain in possession of the creditor until the debt has been satisfied.⁶⁵ The movable incorporeal property may also be pledged by means of a cession made in *securitatem debiti* or “cession as security for a debt”, and it relates to where a personal right is ceded as security for the payment of a debt. Such personal rights involve rights in respect of shares in a company and right to payment in terms of a life insurance policy⁶⁶ as contained in items (iii) and (iv); the 100% shares in one of ABC Limited subsidiaries, DEF Limited and various business insurance policies, respectively. The parties ought to be clear in their agreement whether the cession is an out-and-out cession or whether the cession is in fact a pledge of a personal right, as the effect thereof is important upon sequestration of the debtor’s estate. In an out-and-out cession, ownership of the right in action is transferred to the creditor (the cessionary), but with a pledge the ownership in the right remains with the debtor (the cedent) and the cessionary may only exercise the rights associated with the cession upon default of payment.⁶⁷ The practical difference between an out-and-out cession and a pledge when the estate of the debtor in question is sequestrated is that, if the cession is indeed a pledge, then the creditor becomes a secured creditor of the insolvent estate.⁶⁸ In the situation where such a cession is an out-and-out cession, the creditor becomes the legal owner of the right and can realise the incorporeal property in his own name without heeding any insolvency proceedings. Note however that due to the important practical difference between the two constructions of a cession in security, the courts

⁵⁷ See, Guidance Text, *ibid*, p 8.

⁵⁸ See, Security by Means of Movable Property Act, S 1(1). In *Ikea Trading Und Design AG v BOE Bank Ltd 2005 (2) SA 7 (SCA)*, the court held that the expression “described in the bond in a manner which renders it easily recognisable” means that third parties can determine the identity of each asset which has been bonded without regard to extrinsic evidence (see specifically para 21 of the Judgment).

⁵⁹ *Idem*.

⁶⁰ See, Deeds Registry Act, s 102.

⁶¹ Nagel et al, Commercial Law (5th edition, LexisNexis 2015) 418. See also, Guidance Text, *ibid*, p 9.

⁶² Sharrock, Business Transactions Law (8th edition, Juta 2011) 757. See also, Guidance Text, *idem*.

⁶³ Guidance Text, *idem*.

⁶⁴ See, Sharrock *ibid*, p 754.

⁶⁵ Bartelsmann et al *ibid*, p 441.

⁶⁶ See, Guidance Text, p 10.

⁶⁷ See, *ibid*.

⁶⁸ *Idem*.

have decided that in the absence of clear intention between the parties as to the construction intended, the pledge theory will apply.⁶⁹]

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.)

[In the circumstances, XYZ Bank can go about enforcing its security as follows;

1. In relation to the listed items in paragraph (i) of the relevant facts; the land on which the smelting operations are located. XYZ Bank to enforce its security over the immovable property, will not realise such immovable property itself. If however XYZ Bank has valued the security when proving its claim, the Liquidator may, if authorised by the creditors, within three months from the date of his appointment or from the date of the proof of the claim (whichever is the later) take over the immovable property at the value placed thereon by XYZ Bank when its claim was proved. If the Liquidator does not within that period take over the said property, he has to realise it for the benefit of all creditors whose claims are secured thereby, according to their respective rights.⁷⁰
2. In relation to the property listed in paragraph (ii) of the relevant facts; the existing freestanding and movable smelters. XYZ Bank being a secured creditor holding movable property as security for its claim, must inform the Liquidator, (if a Liquidator has been appointed by the meeting of creditors) in writing of such before the second meeting of creditors.⁷¹ In certain instances, XYZ Bank may realise the movable property itself, but in other circumstances he may not.⁷² In a situation where the creditor (XYZ Bank) may realise the property itself, it is still required to subsequently prove a claim against ABC Limited (the insolvent) in terms of section 44 of the Insolvency Act.⁷³ In circumstances where the XYZ Bank (the creditor) does not realise the property itself, it is required to deliver the property to the Liquidator, after which XYZ Bank must still prove a claim against the Insolvent (ABC Limited) estate.⁷⁴

⁶⁹ O'Shea NO v Van Zyl and Others NNO 2012(1) SA (SCA) Par 36. Also see, Retmil Financial Services (Pty) Ltd v Satam Life Insurance Company (Pty) Ltd and Others [2013] 3 ALL SA 337 (WCC). See also Guidance Text, *ibid*, note 71 at p 10.

⁷⁰ See, Guidance Text *ibid*, p 12. See also Insolvency Act, *ibid*, s 83(11). See also, Bartelsmann et al, *ibid*, p 474.

⁷¹ *Ibid*, p 11. See also *ibid*, s 83(1).

⁷² *Idem*. See also *idem*, s 83(2) and (3).

⁷³ *Idem*. See also *idem*, s 83(5). Note however, where property held as security in favour of a secured creditor for obligations arising out of a master agreement as defined in s 35B(2) of the Insolvency Act, (including eligible collateral in terms of the applicable standards made under the financial sector Regulatory Act 9 2017, or the Financial Markets Act 19 of 2012) has been realised by the creditor, the creditor does not need to prove a claim.

⁷⁴ Guidance Text, *ibid*. See also the Insolvency Act, *ibid*, s 83(6) and (7).

3. In relation to the property listed in paragraph (iii) and (iv); 100% shares in one of ABC Limited subsidiaries, DEF Limited and the various business insurance policies, XYZ Bank can realise the pledge in its own name without heeding any insolvency proceedings, since it has become a secured creditor of ABC Limited estate upon liquidation of ABC Limited under the pledge agreement.^{75]}

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;
- (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.

[Dear Mrs B, my opinion with regards to the issues raised in relation to the relevant facts are as follows;

1. whether the court might recognise the foreign proceedings or the foreign officeholder? Contrary to the practice in many foreign jurisdictions, the foreign officeholder might be recognised⁷⁶ in South Africa while the foreign insolvency proceeding might not.⁷⁷ It is

⁷⁵ Idem. See also Bartelsmann et al, *ibid*, p 443.

⁷⁶ This is however subject to application by the foreign officeholder to the High Court and the Court granting a *rule nisi* to issue and publish the application, calling on all persons concerned to show any cause against the granting to the application, but on several occasions the court has granted the final recognition order without issuing a *rule nisi*. See *Priestley v Clegg* 1985 (3) SA 950 (W), par 954 E-F. The Court order is endorsed by the Master if satisfied that the officeholder has furnished appropriate security, amongst others. See *Exparte Gettliffe* at note 409. The Court order must also be published in the Government Gazette and in one or more South African Newspaper. See *Exparte Steyn* at note 410.

⁷⁷ Although, in the Unreported matter of *Overseas Shipholding Group, Inc and 180 others*, High Court of South Africa, KwaZulu Natal Division, case reference 12827/12, the Court granted an Order recognizing an Order

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Could have included discussion on *Sackstein v Proudfoot*

only a recognition by the court upon the application made by the foreign officeholder that a foreign office holder might be recognised. Generally, a foreign bankruptcy order has no influence on proceedings in South Africa. It is however, generally considered desirable that there should be a single insolvency proceeding. In the case of *In re Leydsdorp & Pietersburg Estates Ltd (in liquidation)*,⁷⁸ the Court has on the application of a foreign officeholder set aside a local winding-up order granted ex parte where the local applicant failed to disclose that it was incorporated in a foreign country where it had already been placed in voluntary liquidation. The Insolvency Act⁷⁹ provides that when it appears to the court to be equitable and convenient that the estate of a person domiciled in a state which has not been designated in terms of section 2 of the Cross Border Insolvency Act should be sequestrated by a court outside South Africa, the Court may refuse or postpone the issue of a sequestration order.

2. Whether the court might order the liquidation of Money Problems SA given the current liquidation of Money Problems NZ. Here, the foreign officeholder will have to request the court grant him/her the necessary powers that will enable him/her to administer the property situated in the court's jurisdiction after the foreign officeholder has been recognised by the court of South Africa. The South Africa Court order for the liquidation of Money Problems SA is not automatic because the recognition order is a declaratory order regarding the foreign officeholder's entitlement, subject to local requirements, to administer the assets as though they were in the relevant foreign jurisdiction from which she derives her authority.⁸⁰
3. Factors that the court will take into consideration when drawing a conclusion. The court may however be persuaded by the following factors when exercising their discretion to reach a conclusion whether to recognise foreign proceedings;⁸¹
 - i. Equitable and Convenient if insolvent is resident outside South Africa. Here, the court would more readily exercise its discretion and refuse to grant a sequestration order on the ground that it would be equitable or convenient for the estate to be sequestrated elsewhere, if the respondent was not found to have been resident within the jurisdiction of the court.⁸²
 - ii. Preference for single proceeding directed by court of domicile. It is most convenient that a matter be adjudicated upon by a South African Court if a debtor has virtually no assets outside South Africa and his only asset in South Africa is immovable property; where an officeholder has not been appointed in a foreign country and application has not been made for recognition in South Africa.⁸³ Many cases have expressed a preference for a single forum of administration. The general rule is that the court of the domicile⁸⁴ should direct the main sequestration and that all other decrees should be ancillary or

granted by the US Bankruptcy Court, District of Delaware, ordering specifically that the automatic stay and related provisions of s. 362 of the US Bankruptcy Code would apply of full force and effect in South Africa in regard to the applicants and any assets of any applicant in South Africa or its territorial waters at any time. See Guidance Text, *ibid*, p 53.

⁷⁸ 1903 TS 254.

⁷⁹ s 149.

⁸⁰ Bertelsmann et al, *Mars- The Law of Insolvency in South Africa* (9th edition, Juta 2008) 664. Unless duly recognised, the Court cannot order the liquidation of Money Problems SA given the current liquidation of Money Problems NZ. See *In re Gurr v Zambia Airways Corporation* [1998] (3) SA 175 (SCA) 179 G.

⁸¹ Although in exercising its discretion, the principle of territoriality remains largely the norm applied by the South Africa Courts. See Boraine, "Comparative notes on the operation of some Avoidance provisions in a Cross-Border Context" 2009 South African Mercantile Law Journal (SA Merc LJ) 463.

⁸² See, *Nahrungsmittel GmbH v Otto* 1991 (4) SA 414 (C).

⁸³ *Deutsche Bank AG v Moser* 1999 (4) SA 216 (C) 219 H-220 C.

⁸⁴ In *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* 2015 (4) SA 72 (WCC), paras 55 and 56, the court noted that domicile of the insolvent in a country was not an absolute requirement for recognition.

subsidiary.⁸⁵ A winding-up order has been refused where a single liquidation order would be more convenient and the interests of local creditors would be as well protected in the foreign proceeding as if a local winding-up order had been granted.⁸⁶ In *Ward v Smit; In re Gurr v Zambia Airways Corp. Ltd.*⁸⁷ the court expressed a preference for a single *concursum creditorum*,⁸⁸ but refused recognition because application was not made timeously. It was decided in terms of the Companies Act 1973⁸⁹ that a South Africa Court had jurisdiction to grant a winding-up order in respect of an external company notwithstanding that it was the subject of a voluntary or compulsory winding-up in the country of its incorporation.⁹⁰

- iii. Assets in South Africa not a prerequisite for recognition. In *Moolman v Builders & Development (Pty) Ltd*⁹¹, the foreign officeholder was authorised to hold an enquiry into the affairs of the insolvent or company in terms of South African Law even though the insolvent or company did not have any assets in South Africa.⁹² If however the order was granted by the court of domicile and the insolvent has movable property only it is a mere formality, but for immovable property the court will apply its discretion.⁹³ Sometimes, the question however whether the bankruptcy order was granted by the debtor's court of domicile is an important consideration. Where under such circumstances only movables of the debtor are situated in South Africa, the recognition order may be a mere formality. A discretion is, however, exercised where immovable property of the debtor is located in South Africa. There must be exceptional circumstances and considerations of convenience before foreign proceedings will be recognised if the foreign order was not granted by the court of domicile.⁹⁴
- iv. The content of a possible declaratory order that the court may make. The content of a possible declaratory order that the court may make can be found in the case of *Moolman v Builders & Developers (Pty) Ltd*⁹⁵ and *Lehane NO v Lagoon Beach Hotel (Pty) Ltd*⁹⁶ respectively.⁹⁷ These may include that;
 - (a) The applicant provide security for the proper performance of the administration;
 - (b) The order of recognition is subject to amendment by the court;
 - (c) The applicant should comply with the provisions for the opening and operations of banking accounts;
 - (d) Funds may be transferred out of South Africa with the written permission of the Master.⁹⁸
 - (e) To administer the estate of the insolvent in respect of all his assets which are or may be found or are situated within South Africa;

⁸⁵ *Re Estate Morris* 1907 TS 657 at 668.

⁸⁶ *Donaldson v British South African Asphalt and Manufacturing Co Ltd* 1905 TS 753 and *In re Leysdorp & Pietersburg Estate Ltd (in liquidation)* 1903 TS 254.

⁸⁷ 1998 (3) SA 175 (SCA) 179 G.

⁸⁸ See Guidance Text, *ibid*, n 164.

⁸⁹ s 344(g).

⁹⁰ See, *Ward v Smit; In re Gurr v Zambia Airways Corp Ltd* 1998 (3) SA (SCA) 183 H.

⁹¹ 1990 (1) SA 954 (A).

⁹² Enquiries are regulated in terms of s 65 of the Insolvency Act for sequestration proceedings, and ss 415 to 417 of the Companies Act 1973 for liquidation proceedings. See Guidance Text, *ibid*, n 426 at p54.

⁹³ Guidance Text, *idem*.

⁹⁴ See *Ex parte Palmer; In re Hahn* 1993 (3) SA 359 (C) and *Lagoon Beach Hotel v Lehane* (235/2015) [2015] ZA SCA 210 (21 December 2015) par 31.

⁹⁵ 1990 (1) SA 954 (A)

⁹⁶ 2015 (4) SA 72 (WCC) par 7.

⁹⁷ See Guidance Text, *ibid*, p 55.

⁹⁸ *Idem; Moolman v Builders & Developers (Pty) Ltd (supra)*.

- (f) With all rights under the Insolvency Act, including sections 64 (insolvent and others to attend meetings of creditors), 65 (interrogation of insolvent and other witnesses), 66 (enforcing summonses and giving of evidence) 69 (trustee must take charge of property of estate) and 82 (sale of property after second meeting and manner of sale), and
- (g) To administer the estate of the insolvent as if a sequestration order had been granted against him by a South African court.

However, additional facts are required in order to answer the question effectively. The facts needed is required to ascertain and determine the type of assets or classification of property of Money Problems SA Limited in South Africa. The question whether Mrs B as a foreign representative in Cross-Border bankruptcy proceedings must approach the South African courts for recognition before being competent to deal with local assets is determined according to classification of property and of persons. The major distinction is drawn between movable property and immovable property.⁹⁹ Movables are dealt with according to the domicile of the individual and therefore order granted by the court of the bankrupt's foreign domicile (*lex domicilii*) automatically divests that individual of his or her movables in South Africa, thus creating a single *concursum creditorum*.¹⁰⁰ In *Trustee of Howse, Sons & Co. v Trustees of Howse, Sons & Co.*,¹⁰¹ an English firm had sought liquidation in London by arrangement or composition arrangement, and its creditors in the Cape Colony had later instituted proceedings for sequestration there. The firm had only movable assets in the Cape. "The general rule relating to movable or personal estate", said De Villiers C.J., "is that it is subject to the same law as that which governs the person of the owner, in other words, the law of his domicile"¹⁰² satisfied that local creditors' rights would not be harmed, the cape court even set aside the sequestration proceedings in the cape and the local trustees' appointment.¹⁰³ This rule is however a simplifying means of general transfer of rights (*titulo universalis*) and prevents confusion otherwise caused by conflicting *leges rei sitae*.¹⁰⁴ Although the rule assigns the movables to their owner's domicile by a fiction based on comity, the foreign order will have to be given effect to under South Africa law.¹⁰⁵ The better view is that the foreign trustee already owns the movables. Yet the foreign trustee's ownership (*dominium*) is not unlimited. To protect local creditors, the court, usually imposes conditions for the trustee's dealing with the local assets and removing them or their proceeds from the jurisdiction.¹⁰⁶

In relation to immovable property, the rule does not distinguish between types of persons, whether individuals or juristic persons. The law of the location of the immovable (*the lex situs, the lex rei sitae*) is decisive, and the effect of the foreign sequestration order is limited territorially.¹⁰⁷]

⁹⁹ Alastair Smith; Andre Boraine, *Crossing Borders in South Africa Insolvency Law: From the Roman-Dutch Jurists to the UNCITRAL Model Law*, 10AM. Bankr. Inst. L. Rev. (2002) p 178.

¹⁰⁰ *Idem*. See also *Ex parte Palmer NO (In re Hahn)*, 1993 (3) SA 359 (C) 362 H.

¹⁰¹ 1910 3 SC at 19.

¹⁰² *Idem*.

¹⁰³ See, A.B Edwards, *Conflict of Laws*, in 2 *Law of South Africa*, 458nn. 19-21 (W.A. Joubert, *Founding ed.*, 1st reissue 1993). See also Alastair Smith; Andre Boraine, *ibid*, p 179.

¹⁰⁴ *Idem*.

¹⁰⁵ See Alastair Smith; Andre Boraine, *idem*.

¹⁰⁶ *Idem*. See also *Moolman v Builders & Developers (Pty) Ltd (supra)*. The rule has been applied in corporate liquidation in the cases of *Donaldson v British SA Asphalte and Mfg. Co. Ltd (supra)*; *Ward and Another v Smith and Others*; *In re Gurr v Zambia Airways Corporations Ltd (supra)*. In the case of *In re Gurr v Zambia Airways Corporation Ltd*, the Supreme Court of Appeal held and found that, for present purposes, the foreign liquidators had no authority outside Zambia. They might seek recognition in South Africa, where the courts, in the exercise of their jurisdiction and careful to protect the interest of local creditors, might authorise those liquidators to deal with the local assets, for the sake of comity.

¹⁰⁷ *Idem*.

*** End of Assessment ***