



**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.

A voluntary business rescue is initiated by the special resolution of the board of directors of a company. Business rescue commences with the filing of the resolution with the Companies and Intellectual Property Commission (CIPC).

A compulsory business rescue is initiated upon the filing of an application at court by an affected person. An affected person is defined in section 131 of the Companies Act 2008, and can be a shareholder, or creditor or registered trade union representing employees of a company and any non-unionized employees.

### Question 2.2 [maximum 8 marks]

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

Business Rescue proceedings are governed by the provisions of sections 128 – 137 of the Companies Act, 2008.

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Could have discussed alternative goals of BR

The preconditions for commencement of business rescue proceedings are that the company is financially distressed and there is a reasonable prospect of rescuing it.<sup>1</sup>

The threshold thus encompasses a two-pronged test. In the first instance, it must be proved that the company in question is financially distressed.

Section 128(1)(f) of the Act defines "financially distressed" as:

*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 become due and payable within the immediately ensuing six months;*  
*or*
- (ii) *(ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.*

These criteria represent the cash-flow and balance sheet tests respectively.

The second fold of the test governs the probabilities of the reasonableness of a Business Rescue.

The board of directors in the case of a voluntary business rescue under section 129(1)(b) of the Act, or the affected person in an application for compulsory business rescue under section 131, must demonstrate a reasonable prospect of saving the company.

In *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (609/2012) [2013] ZASCA 68 (27 May 2013) the Court held that "reasonable" refers to the "standards of the reasonable person, or whether the negligent conduct should attract legal liability and thus be regarded as wrongful."<sup>2</sup>

The Court held further at para 23:

*The potential business rescue plan s 128(1)(b)(iii) thus contemplates has two objects or goals: a primary goal, which is to facilitate the continued existence of the company in a state of insolvency and, a secondary goal, which is provided for as an alternative, in the event that the achievement of the primary goal proves not to be viable, namely, to facilitate a better return for the creditors or shareholders of the company than would result from immediate liquidation.*

Therefore, the requirement of rescuing a company must be evident from the onset, and the application for business rescue should not be launched in the face of obvious dissolution of the company where there is no prospect of the company being saved.

In *A G Petzetakis International Holdings Ltd v Petzetakis Africa (Pty) Ltd* 2012 (5) SA 515 (GSJ) the Court held:

*[17.1] The requirements for the granting of a s 131 rescue order include that the company under consideration must have a reasonable prospect of recovery.*

*[17.2] Once a company is under business rescue, its rescue plan may be aimed at the alternative object, namely a better return than the return of immediate liquidation.'*

<sup>1</sup>*Panamo Properties v Nel NO; Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (609/2012) [2013] ZASCA 68 (27 May 2013) Loubser, A. (2010). "The business rescue proceedings in the Companies Act of 2008: Concerns and questions (part 1)" *SALJ* 2010(3), 501-514 at 502.

<sup>2</sup>*Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* (609/2012) [2013] ZASCA 68 (27 May 2013) at para 21.

In conclusion, an application for business rescue is much like the assessment of whether to keep a patient on life support in the reasonable expectation that his condition will improve; or where there is no possible hope of restoring him, to turn off the support, or dissolve the company.

### 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.

#### ISSUE:

- (a) What type of security is required for immovable property?
- (b) What security is required for movable property?
- (c) What security is required over company shares?
- (d) What security is required over insurance policies?

#### LAW:

Security is defined in the Insolvency Act 24 of 1936 ("Insolvency Act") as:

*...in relation to the claim of a creditor of an insolvent estate...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.<sup>3</sup>*

Under the South African Law of Insolvency, the holder of a special mortgage obtains a right of security over either immovable or movable property.

A "Special Mortgage" includes:

- (a) A mortgage bond hypothecating any immovable property;
- (b) A notarial bond hypothecating specially described movable property registered in terms of section 1 of the Security by Means of Movable Property Act 57 of 1993; or
- (c) A notarial bond hypothecating specially described movable property in terms of the Notarial Bonds (Natal) Act 18 of 1932.

<sup>3</sup> Section 2 of Act 24 of 1936.

Commented [INS 15]: 7.  
Law not properly applied to the facts.



*Mortgage bond: Immovable Property*

In order to secure a right of security over immovable property, a mortgage bond must be executed (by a conveyancer) before the Registrar of Deeds. The mortgage bond specially hypothecating such property, will indicate the debt that the property is secured for including the amount of debt secured.

Once this is done, the creditor obtains a secured claim against the estate of the insolvent. The property so bonded cannot be transferred without the bond being cancelled, or with the written permission of the mortgage bond holder.

*Notarial Bond*

There are two types of notarial bond: A general notarial bond, and a special notarial bond. Both these bonds secure a right over movable property. These types will be discussed hereunder:

*General Notarial Mortgage Bond*

A general bond is registered in the Deeds Office and hypothecates movable property in general. However, because in terms of section 2 of the Insolvency Act, it is not regarded as a "special mortgage" the holder of the bond is not a secured creditor.

Such creditor obtains a preferent claim in the rank of priority of payments under the Insolvency Act.

*Special Notarial Bond*

A special notarial bond registered in terms of section 1 of the Security by Means of Movable Property Act on or after 7 May 1993 or registered in Natal in terms of section 1 of the Notarial Bonds (Natal) Act before 7 May 1993 hypothecates corporeal movable property which can be readily identified. The property must be described in the bond in a manner making it readily recognisable.

The bond must be registered at the Deeds Office. Once registered the property is deemed to have been pledged to the mortgagee and the mortgagee becomes a secured creditor.

*Pledge*

A pledge is an agreement between the creditor and debtor in terms of which the debtor cedes movable corporeal property to the creditor through delivery of the said property to the creditor. After delivery, the property in question is said to be pledged to the creditor. No registration is required for this agreement.

The property remains in the possession of the creditor until the debt is satisfied.

In as far as movable incorporeal property is concerned, same may be pledged through a cession *in securitatem debiti* as cession for a debt. When this happens the debtor cedes his personal right, or right *in rem* as security for the debt. Again, no registration to found its validity is required.

Property thus capable of being ceded in this way includes rights in respect of shares in a company, or a right to payment under a life policy, or the right to claim payment for the "book debts" owed to the debtor, or the right of action under a negotiable instrument.

A distinction must be drawn between an out-an-out cession and a pledge of a personal right in terms of which in the former, ownership of the right in action is transferred to the creditor, whereas ownership in the latter case remains with the debtor. Therefore, in the situation of a pledged movable item, the cessionary/creditor may only pursue an action against the debtor if the debtor defaults on his obligations.

For insolvency purposes, the difference between an out-an-out cession and a pledge of a personal right is that upon sequestration, it is only a pledge that can convert the creditor's

claim to a secured one. In the out-and-out cession, the creditor can realize the right conferred upon him through the cession in his own name and without reference to insolvency proceedings.

Where it is difficult to delineate the true agreement between the parties *vis-à-vis* an out-and-out cession or a pledge, the Courts have held that the pledge theory will apply.

### APPLICATION OF THE LAW TO THE FACTS

XYZ may be able to provide a myriad of security options as follows:

- (i) The land on which the smelting operations are located:  
The land is categorized as immovable property and therefore capable of being mortgaged through a mortgage bond hypothecating immovable property.
- (ii) The existing freestanding and movable smelters:  
The freestanding and movable smelters may be bonded through a notarial bond.

It is advisable for XYZ to pass a special notarial bond over the above smelters making the property easily identifiable, but more importantly, so that XYZ obtains secured creditor status in the event of the insolvency of ABC.

If ABC elects to pass a general notarial bond, as with the special bond, both types of bond are registered with the Deeds Registry, but the general bond will not confer secured security status upon XYZ in the event of ABC's insolvency.

XYZ will – in all likelihood to ABC's benefit – be an unsecured creditor and therefore paid out after secured creditors in the priority of payment rankings.

- (iii) 100% shares in one of its subsidiaries, DEF Limited and various business insurance policies:  
These items are incorporeal movable items and thus may be ceded by a cession *in securitatem debiti*.

If ABC decides to pledge these items in this fashion, ABC must take care to define the cession agreement with accuracy by expressly stating the type of cession made.

ABC must be aware if agreeing to an out-and-out cession that the rights so ceded will have no bearing on any potential insolvency proceeding. In other words, XYZ may proceed in its own name to realize the property so ceded irrespective of whether ABC has been placed in liquidation or not.

If the cession is a pledge, XYZ becomes a secured creditor upon the insolvency of ABC.

Should the parties have drafted a cession agreement in which, and perhaps despite their best efforts, the intention of the parties is unclear, then under the pledge theory, XYZ will be regarded as a secured creditor for purposes of a winding-up.

### **Question 3.2 [maximum 5 marks]**

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?

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Could have included discussion in re consequence of possible out-and-out cession of the shares.

(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.)

Enforcement of security commences the moment at which the estate of the insolvent vests in the Master, and thereafter the trustee.

Creditors with claims are requested to formally prove their claims in terms of the procedure laid out in the Insolvency Act.

Creditors holding security over immovable property may not realize the value of the property themselves, as these properties are ring-fenced for payment to secured creditors as per the order of priority of payments.

However, if the creditor has valued the property himself as at the date of filing proof of his claim, then the trustee may take over the property within three months of his appointment, or within three months of the filing of the claim (whichever is the latter) and subject to the approval of the remaining creditors.

If the trustee does not take over the property within this time, the trustee has to realize it for the benefit of all secured creditors.

Creditors holding a secured right over the movable property of the debtor must inform the Master in writing, timeously as well as file proof of his claim against the estate.

The creditor may realize the value of the property himself, and if he elects to proceed in this fashion, he must prove a claim under section 44 of the Insolvency Act.<sup>4</sup>

Where the creditor does not realize the property himself, he may deliver the said property to the trustee or liquidator as the case may be for realization but must still prove a claim against the estate.

#### **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, –

<sup>4</sup> In *Van Zyl and Others NNO v The Master, Western Cape High Court, and another* 2013 (5) SA 71 (WCC) the court held that as a principle a creditor may not, after *concursum creditorum* improve his position to the detriment of other creditors.

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Could have included discussion on factors that court will take into consideration

- (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.

To: The Liquidator: Ms B Sure

[B.sure@howitworks.org.nz](mailto:B.sure@howitworks.org.nz)

Dear Madam

**RE: LEGAL OPINION: MONEY PROBLEMS NZ (in liquidation) / MONEY PROBLEMS SA**

#### **A. INTRODUCTION**

1. This letter is provided pursuant to your written request dated 13<sup>th</sup> October 2021 for a legal opinion regarding the insolvency of Money Problems (in liquidation) and the legal position of the foreign officeholder.
2. The provision of this opinion is not to be taken as implying that I owe any duty of care to anyone other than my client in relation to the content of the opinion herein.
3. This letter sets out my opinion on South African Insolvency Law as at today's date and as currently applied by the South African courts.
4. This letter is to be governed by and construed in accordance with South African law.
5. For the purposes of this letter, I have examined:
  - (a) The pleadings thus far in the application for liquidation of Money Problems NZ
  - (b) The Insolvency Act 24 of 1936;
  - (c) The Companies Act 61 of 1973;
  - (d) The Companies Act 71 of 2008; and
  - (e) The Cross-Border Insolvency Act 42 of 2000.
  - (f) Various judgments from local and foreign jurisdictions.

#### **B. BACKGROUND**

6. Although in theory an application for the recognition of foreign proceedings need not be made in a South African Court, prudence dictates that such application be made before a foreign representative can deal with local assets and deal with the administration of the property. **Sackstein NO v Proudfoot (pty) Ltd 2003 (4) SA 348 (SCA).**

7. By way of an overview the procedure is outlined as follows:

7.1 The foreign insolvency representative will have to request the court to recognize him/her and for purposes of granting him the necessary powers that will enable the representative to trace and execute on local assets.

7.2 A *rule nisi* will usually be issued by the Court and published with a call for all interested persons to show cause why the final order should not be granted.

7.3 A *rule nisi* is the appropriate order in cases where the insolvent has South African creditors to fulfil the *audi alteram partem* rule. **Priestley v Clegg 1985 (3) SA 955 (T).**

7.4 If there are no local creditors a *rule nisi* is dispensed with. **In re Macdonald Ltd 1923 EDL 15.**

7.5 If it is suspected that the debtor may dispose of property, a temporary interdict may be included as part of the prayers but then directions for service on the debtor must be included.

7.6 The order made is a declaratory order "regarding the foreign trustee's entitlement, subject to local requirements, to administer the assets as though they were in the relevant foreign jurisdiction from which [the trustee] derives his authority."<sup>5</sup>

#### **B.1** *Will the Court recognize the foreign proceedings of the foreign officeholder?*

8. In general, at common law no Court is bound to recognize the appointment of a trustee made in another jurisdiction. **Singularis Holdings Ltd v PricewaterhouseCoopers (Bermuda) [2014] UKPC 36 (10 November 2014) [2015] 2 WLR 971.**

9. In South African proceedings, it is the foreign office-holder who is recognized and not the foreign insolvency proceedings.

10. A foreign officeholder obtains recognition by an order of the South African Court. **Moolman v Builders & Developers (pty) Ltd 1990 (1) SA 954 (A)** at 959G/H-I.

11. When considering an application for recognition, the South African Courts apply the following *common law* principles of cross-border insolvencies:

- (i) Equity<sup>6</sup>
- (ii) Comity, and
- (iii) Convenience. T

12. The absence of assets in South Africa is no boundary to the authorization of a foreign office-holder. **Moolman v Builders & Developers (pty) Ltd 1990 (1) SA 954 (A).**

<sup>5</sup> Mars *Insolvency Law* 9ed. Chapter 30 at page 737.

<sup>6</sup> *In re Gurr v Zambia Airways Corporation Ltd* 1998 (3) SA 175 (SCA) 179G-I; *Lamonica v Baltic Reefers Management Ltd.*

**B.2** Will the Court order the liquidation of Money Problems SA in light of the liquidation of Money Problems NZ?

Factors that the Court may take into account when arriving at a conclusion:

**(i) Equity**

- 13.1 The *Insolvency Act* is silent as to assets of a debtor situated in a foreign jurisdiction.
- 13.2 However, there is authority for the proposition that an external company in South Africa may be wound up separately from its parent company. **Sackfoot** *supra*.
- 14.1 The common law position is that movable property of the insolvent in a foreign country will vest in the insolvent estate of the debtor if sequestrated by the court where he is domiciled.
- 14.2 Movable assets render the application for recognition a simple formality.
15. Immovable property must be administered in terms of the *lex rei sitae*.
16. The Courts will require exceptional circumstances and consideration of convenience before foreign proceedings will be recognized in the absence of a foreign order granted by the court of the insolvent's domicile.
17. Insofar as the Cross-Border Insolvency Act 42 of 2000 is concerned, where the estate of a person domiciled in a State which does not fall under section 2 of the designated States of the *Cross Border Insolvency Act*, and it appears to the Court so saddled with a sequestration application, equitable and convenient for the outside court to indulge the sequestration, the Court may refuse or postpone the granting of a sequestration order.
18. In terms of the Companies Act 61 of 1973 a South African liquidator is empowered to recover and reduce into possession all assets and property of the company wherever situated.

**(ii) Comity and Convenience**

19. *Comitas* is a legal principle based on a mutual concession of advantages and privileges that exists between the legal systems of both countries of the insolvent for the benefit of both foreign and also local creditors of the Insolvent.
20. Applying this principle results in a single forum of administration, akin to synthetic proceedings.
21. *Comitas* offers a preference for the coordination of insolvency proceedings concerning the insolvent which take place in different jurisdictions and will streamline them with the object of achieving a greater benefit for creditors. **Ex parte LaMonica v In re Eastwind Development SA (Baltic Reefers Management Lth intervening) [2010] JOL 24733 (WC)**.

22. Therefore, application for recognition can and has been refused where the interests of local creditors are adequately protected as if a local winding-up order had been granted. **Ward v Smit: In re Gurr v Zambia Airways Corp Ltd 1998 (3) SA 175 (SCA) 179G.**

23. Comity is not applied if it conflicts with public policy. **Society of Lloyd's v Romahn and two other cases 2006 (4) SA 23 (C).**

**B.3** What will the content of the Declaratory order be?

23.1 The first prayer must be to recognize the foreign officeholder, thus allowing him to deal with local assets.

23.2 The Court will impose conditions for the protection of local creditors to ensure an equal division of the estate of the insolvent. **Moolman v Builders & Developers (pty) Ltd 1990 (1) SA 954 (A).** **Lehane NO v Lagoon Beach Hotel (pty) (Ltd) 2015 (4).**

24. It is necessary to draft the prayers in a format that would achieve a reasonable resemblance of the following draft declaratory order::

(a) *Recognising the appointment of the applicant (in terms of the laws of the Republic of New Zealand) as provisional Liquidator in the insolvent estate Money Problems NZ (Pty) Ltd (in Liquidation) on the terms set out herein, within the Republic of South Africa until such recognition is withdrawn by order of this Court.*

(b) *Directing that the applicant provide security to the satisfaction of the Master of this Honourable Court for the proper performance of his administration by virtue of this order and for the herein mentioned Master's costs and charges;*

(c) *Declaring that thereafter the applicant shall by virtue of this recognition be empowered to administer the said estate in respect of all assets of the said estate which is situated or may be found within the Republic of South Africa;*

(d) *The rights defined by the Insolvency Act 24 of 1936 read together with the Companies Act 61 of 1973 as amended in favour of the Master, a creditor, and a company being wound up, in regard to meetings of creditors, proof, admission and rejection of claims, sale of assets, plans of distribution of proceeds, and the rights and duties of a liquidator in regard to those matters as defined in the Acts as aforesaid shall, until this order is amended, mutatis mutandis, exist in relation to the said administration as if the said Acts applied thereto pursuant to a provisional winding up order granted by this Court on [insert date] provided that:*

(i) *The rights and duties relating to the election and appointment of a liquidator will not apply;*

(ii) *The requirements relating to the filing of inventories shall not apply;*

(iii) *The costs of this application taxed on the scale as between attorney and client and such amounts as would have been payable to the Master under the law of the Republic of South Africa if the Company had been wound up under such law and any additional costs and charges of the Master for giving effect to this order will be costs of administration;*

- (iv) *The rights and duties defined by Section 70 of the Insolvency Act 24 of 1936, read with section 394 of the Companies Act No. 16 of 1973 shall exist in relation to the administration;*
- (v) *Any assets and furthermore any funds remaining after the payment of all amounts due in respect of the afore-mentioned charges, costs and proved claims, may be transferred from the Republic of South Africa to New Zealand only with the written permission of the Master of this Court.*

### **C. CONCLUSION**

- 25. The case of *Sackfoot supra* is authority for the proposition that although an application for recognition need not be made, an external company may be wound up separately from its parent company.
- 26. If the liquidator, following the rule set out in *Moolman*, launches a successful application for recognition, then it is probable that Money Problems SA can be liquidated as a single forum under the control of Mrs B.
- 27. The decision to wind-up Money Problems SA under Money Problems NZ must fundamentally satisfy the equity principle which is the protection of local creditors.
- 28. Mrs B will need to demonstrate that it is more convenient for her as the liquidator of the “main proceedings” to gather the assets and distribute the realization of claims in a single forum, than to let the South African creditor pursue an action under section 391 of the Insolvency Act 24 of 1936.

We trust you find this opinion sufficient in the anticipation of further legal steps.

Yours faithfully

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Adv. C. Lever

**\* End of Assessment \***