



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 sets aside –

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

Question 1.3

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 commencement of business rescue is when the business rescue proceedings is initiated by the board of directors of a company by adopting a business rescue resolution. The proceedings become effective when the resolution is filed with the Companies and Intellectual Property Commission.

In contrast, Compulsory business rescue proceedings is when the business rescue proceedings is initiated by the court after an application was brought by an affected person. The affected person refers to 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 in Section 138 (a) of the Companies Act 2008.

In brief voluntary commencement of business rescue is initiated by the company through its board of directors while compulsory commencement of business rescue is initiated by the court through an application by an affected person.

Question 2.2 [maximum 8 marks]

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

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Could have discussed reasonable prospects; application for liquidation when practitioner no longer has reasonable grounds.

According to Section 128 (1) (b) "business rescue proceedings are proceedings aimed to facilitate the rehabilitation of a company that is financially distressed for:

- I. the temporary supervision of the company, and of the management of its affairs, business and property;
- II. a temporary moratorium on the rights of claimants against the company or in respect of property in its possession and;
- III. the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company".

A company is financially distressed if "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 it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months". (Section 128(1)(f) of Companies Act, 2008)

From the provisions of Section 128, a company is required to commence business rescue proceedings at the first signs of financial distress within the meaning of the Act. So when a company becomes aware that it is reasonably unlikely that it will be able to pay its debts when they fall due for payment in the immediately ensuing six months or it is likely that the company will become insolvent in the immediately ensuing six months, it must commence rescue proceedings. In the case of *Welman v Marcelle Props 193 CC JDR 0408 (GST)*, the court stated that "business rescue proceedings are not for terminally ill close corporations, nor are they for chronically ill but for ailing corporations, which given time will be rescued and become solvent".

Business rescue proceedings may be commenced through two ways either through voluntary business rescue or by compulsory business rescue proceedings.

Voluntary business rescue proceeding is initiated when the board of directors of a company passes a resolution to place the company under business rescue. The board may resolve to place the company in voluntary rescue proceedings 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. This process is regulated by section 129 of the Companies Act.

Compulsory business rescue proceedings starts when an application is made to court to place the company under business rescue by an affected person. This process is regulated by section 131 of the Companies Act. This provision is evoked by the court on the grounds that (Section 131(4)(a) of the Companies Act):

1. the company is financially distressed,
2. the company has failed to pay over any amount in terms of an obligation under a public regulation or contract in respect of employment matters, or
3. it is otherwise just and equitable to do so for financial reasons.

In conclusion, the threshold for a company to enter business rescue proceedings is: When the company is under financial distress and there is reasonable prospects that if it uses business rescue the business revert to solvency.

Lastly when even though there are no reasonable prospects of solvency but business rescue will inure to better results for the creditors or the shareholders than immediately liquidating 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.

According to Section 2 of the Insolvency Act 'security', 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.

From the definition the following securities are available to ABC Limited under the Insolvency Act:

1. Special mortgage
2. Hypothec
3. Pledge
4. right of retention

Special mortgage

'Special mortgage' means a mortgage bond hypothecating any immovable property or a notarial mortgage bond hypothecating specially described movable property in terms of section 1 of the Security by Means of Movable Property Act, 1993 (Act 57 of 1993), or such a notarial mortgage bond registered before 7 May 1993 in terms of section 1 of the Notarial Bonds (Natal) Act, 1932 (Act 18 of 1932), but excludes any other mortgage bond hypothecating movable property. Under the insolvency Act, a special mortgage includes the following:

- I. A mortgage bond hypothecating any immovable property: A mortgage bond is a type of security based on an agreement by the terms of which the Mortgagor borrows money from the Mortgagee and agrees to pass a mortgage bond over a specific immovable property in favour of the Mortgagee as security to the Mortgagee for the repayment of money. The document is called the mortgage bond. All immovable property which are registrable in a Deeds Office are qualified for a mortgage bond.
- II. This is what happens when in event of the mortgagor's insolvency, the Mortgagee has the preferential claim to the proceeds of the property if it is sold pursuant to the

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Law not fully and properly applied to the facts.

Mortgagors insolvency in this instance XYZ Bank will be entitled to claim from the proceeds of the sale what is due to it first before concurrent creditors are paid from any residue of the proceeds

- III. A notarial mortgage hypothecating specially described movable property registered before section 1 of the security by Means of Movable Property Act 57 of 1993. By a notarial bond a movable property is mortgaged in favor of a creditor without any requirement to deliver the property to the creditor. Its either general or specific.
- IV. A notarial mortgage bond hypothecating specially described movable property registered before 7 May 1993 in terms of section 1 of the Notarial Bonds (Natal) Act 18 of 1932

A special mortgage of immovable property is created by a mortgage bond.

Pledge

A pledge creates a right of security over movable corporeal property. The pledged object is placed in the possession of the creditor or pledge holder. The pledged object will remain in the possession of the pledge holder until the debt has been fulfilled, the creditor will however not be able to use the asset or fruits of the asset. Incorporeal property may be pledged by means of a cession made in *securitatem debiti* or "cession as security for a debt". It happens when a personal right is ceded with respects of shares in a company, a right to payment in terms of life insurance policy, the right to claim payment from debtors capture in an accounting record or the right to action under a negotiable instrument. Security over certificated stock or shares may be created by way of a pledge agreement while security over uncertificated stocks may be created by way of a security cession agreement.

A security in the form of a pledge is created by mutual agreement between the debtor and creditor and no registration requirement is needed for its validity. The agreement between the debtor and creditor would clarify whether the cessation is an out-and-out cession or whether the cession is a pledge of personal right this is because the effect of the cessation is important upon the sequestration of the debtor's estate.

If the cession is an out-and-out cession the ownership of the right remains with the cedent (debtor) and the cessionary may only exercise the rights associated with the cession only upon default of payment. If a cession is a pledge, then the creditor will become a secured creditor of the insolvent estate but when the cession is an out-and-out cession, the creditor will become the legal owner of the right and can realize the incorporeal property in their personal names without heeding any insolvency proceedings.

Right to retention

A right of retention or a lien enable a creditor to retain a retain physical control of the property until compensated by the debtor. It arises where a person acquires possession of another person's property whether movable or immovable and spends money to makes improvements to the property while it was in his possession. A lien is created by the operation of law. There is no formal registration requirement to create a valid lien.

In conclusion ABC Ltd can consider security in the form of special mortgage or a pledge.

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?

(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.)

When a court grants a sequestration order the estate of the insolvent is vested in the Master. The estate however becomes vested in the trustee when a trustee is appointed. The estate of the insolvent includes both the movable and immovable property and this proceeds of property in the hands of the sheriff under a writ of attachment which is owed by the insolvent at the date of sequestration and all property acquired by the insolvent or accruing to him during sequestration.

Upon sequestration all creditors of the insolvent estate must prove their claims against the insolvent estate in order to receive any payments from any realization of the estate assets. Any creditor who holds security for their claims are required to produce the details of the security that they hold when proving their claims. Therefore, XYZ Bank should produce the details of their security to the liquidator.

All creditors who hold security over movable property must inform the master and the liquidator by a written notice of their security before the second creditors meeting. Creditors who securities defined in Section 1(1) of the Financial Markets Act 19 of 2012 may be realized by the creditor himself. If a creditor holds a security that he is qualified by law to realize himself he is still required to subsequently prove a claim against the insolvent in terms of section 44 of the Insolvency Act. If the creditors hold property which he is not permitted by law to realize himself he is required to deliver the property to the trustee and after still prove a claim against the insolvent estate.

In regards to Landlord's legal hypothec and a right of retention, possession is important for the validity of the security, so even though they will be required to deliver the property to the trustee, the creditors will not lose their security by virtue of delivering the asset to the trustee. The creditor will notify the trustee in writing of his rights and subsequently prove their claims against the insolvent estate.

Creditors who hold security over immovable property in securing their claims may not realize the immovable property themselves. The creditor values his security when proving his claim and the liquidator may if he has been authorized by the creditors within three months from the date, he was appointed trustee or from the date of the proof of the claim by the security holder take over the immovable property at the value placed thereon by the creditor when the claim was proved. If the trustee

e within that period does not take over the property, he has to realize the property for the benefit of all creditors who have a secured claim over the property according to their rights respectively.

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.

The Cross-Border Insolvency Act 42 of 2000 which was implemented on 28 November 2003 is the legislative version of the UNCITRAL Model Law on Cross Border Insolvency. The Cross-Border Insolvency Act is in force but not effective yet. South African law on cross-border insolvency is presently controlled by common law principles.

Whether the court might recognize the foreign proceedings or the foreign officeholder.
As a general rule the court will recognize the foreign officeholder in South Africa and not the foreign proceedings. An exception is the fact that 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 granted by the US Bankruptcy Court, District of Delaware, ordering specifically that the automatic stay and related provisions of section 362 of the US Bankruptcy in South Africa or its territorial waters at any time.

A Foreign Officeholder seeking to be recognized in South Africa is required to apply to the High Court. The High Court in fairness to third parties is expected to grant a rule nisi to issue and publish the application calling on all persons concerned to show any cause of against the

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Could have included more detailed discussion on factors that court will take into consideration; and comity

granting of the application, however the courts in practice have several times granted the final recognition order without issuing a rule nisi (*Priestley v Clegg* 1985 (3) SA 950 (W), para 954E-F).

A foreign officeholder requires recognition by an order of a South African court before the officeholder is entitled to deal with local assets (*Ex parte LaMonica v In re Eastwind Development SA* (Baltic Reefers Management Lth intervening)). The qualifications of an officeholder is not decided according to the law of South Africa but is decided according to the law of the country where the officeholder was appointed. Recognition of a foreign officeholder will allow the officeholder to rely on domestic South African law in carrying out his duties.

A foreign proceeding generally does not have any influence on proceedings in South Africa. Judgements from foreign jurisdictions are not directly enforceable in South Africa. Recognition of foreign judgments in South Africa is governed by Common law. Statutes through the Enforcement of Foreign Civil Judgements Act 32 of 1988 applies to some specific cases. Although foreign judgements are not directly enforceable in South Africa, the foreign judgement establishes a course of action which will only become enforceable in South African courts if certain common law requirements are met. The requirements include:

- I. The foreign court should have had international competence as determined by the law of South Africa
- II. The judgement should be final and conclusive
- III. The enforcement of the foreign judgement should not be contrary to the public policy of South Africa or its concept of natural justice
- IV. The judgement should not have been obtained fraudulently
- V. The foreign judgment should not involve the enforcement of a penal or revenue law of the foreign state and lastly the enforcement must not be prohibited by the Protection of Business Act 99 of 1978.

In conclusion, Mrs. B will be recognized in South Africa.

Whether the court might order the liquidation of Money Problems SA given the current liquidation of Money Problems NZ

As a general rule the court in South Africa will not grant a winding up in respect of an external company notwithstanding that the company is undergoing liquidation voluntary or compulsory liquidation in the country of incorporation.

In *Ward v Smit*; *In re Gurr v Zambia Airways Corp Ltd* the court refused to recognize a winding-up order, the refusal was on the grounds that in the terms of the Companies Act 1073 a South African court has no 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.

Even though by law both entities are a single legal person, the law of South Africa requires that the external company be wound up separately from its parent company (*Sackstein NO v Proudfoot (Pty) Ltd*).

In conclusion, Mrs. B will have to file for a separate winding up order in South Africa against Money Problems SA in order to succeed at liquidating it.

Factors that the court will take into consideration when drawing a conclusion

The court will take into account certain factors before recognizing the foreign order. Below are just a few:

That it is equitable and convenient (if the insolvent is resident outside South Africa): the court will more likely exercise its discretion against the granting a sequestration order on the ground that the insolvent is not resident within the jurisdiction of the court. It is more equitable and

convenient for the estate of the insolvent to be sequestrated by a court where the insolvent is resident within the jurisdiction of the court.

The domicile of the insolvent at the time when recognition is requested: the general rule is that the court of the domicile should direct the main sequestration and all other decrees should be subsidiary. It is actually most convenient that a matter should be determined by a South Africa in the situation where the debtor has no assets outside South Africa and the only assets which are outside South Africa are immovable property and in addition the officeholder was not appointed in a foreign country and no application for recognition has been made in south Africa.

Whether or not the company owns movable and or immovable property in South Africa: In the case of *Moolman v Builders & Developers (Pty) Ltd.*, even though the insolvent company had no assets in south Africa, the court authorised the foreign officeholder to conduct an enquiry into the affairs of the company in accordance with South African law.

The value of the assets in the foreign state compared to the assets in South Africa owned by the company.

The interests of all the affected parties particularly the creditors in general as well as the insolvent.

If order was granted by the court of domicile and the insolvent has movable only it is a mere formality, but for immovable property the court will apply its discretion: in a situation that the insolvent only has movable assets in South Africa the recognition may just be a mere formality. The court will exercise discretion if the debtor has immovable property in South Africa.

In this case, facts are not given as to the type of properties Money Problems SA own in South Africa, supposing it Money Problems SA owns no immovable property in South Africa then the court will recognize the foreign proceedings from New Zealand considering the application for recognition as a mere formality. However, if the reverse was the case that Money Problems SA owns immovable property in South Africa then the court will exercise a discretion taking all other factors into consideration. With regards to the insolvent's immovable property, the principle of *lex situs* applies therefore the foreign property will remain vested in the insolvent's estate. The recognition is not a mere formality because the court will apply absolute discretion.

The court in deciding to grant a discretionary order firstly decides whether or not to grant the recognition of the foreign trustee, then the exact powers to grant him, then determine what limitations should be in place in terms of his recognition order and lastly whether or not to grant the application sought.

The contents of a possible declaratory order that the court may make

Once the foreign officeholder has made an application to a High Court in South Africa and he has been recognized as a foreign representative by the court in South Africa, the foreign debtor's local assets, both movable and immovable, will be dealt with in terms of South African law. Although the debtor is not an insolvent in terms of South Africa's jurisdiction, he is treated as an insolvent in terms of South African Law. In effects, the recognition of the foreign officeholder will not prohibit local or other foreign creditors from seeking a sequestration order.

The content of the recognition order will include the following, by order of this Court:

1. Direct that the applicant provide security to the satisfaction of the Master of this honorable Court for the proper performance of his administration by virtue of this order and for the herein mentioned Master's costs and charges;

2. Declare 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 are situated within the Republic of South Africa;
3. The rights defined by the Insolvency Act 24 of 1936 read together with the Companies Act 61 of 1973 as amended in favor of the Master, a creditor, and a company being wound up;
 - I. in regard to meetings of creditors,
 - II. proof, admission and rejection of claims;
 - III. sale of assets;
 - IV. plans of distribution of proceeds; and
 - V. The rights and duties of a liquidator in regard to those matters as defined in the Acts.
4. 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;
5. 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 the Republic of New Zealand only with the written permission of the Master of this Court.
6. declare that all rights under the Insolvency Act shall exist, including the right of insolvent and others to attend meeting of creditors (Section 64), the right to interrogate the insolvent and other witnesses (section 65), enforcing of summonses and giving of evidence (section 66), trustees must take charge of property of estate (section 69), and right to sale of property after second meeting and the manner of sale (section 82).

(Moolman v Buildings v Developers Ltd, Lehane NO v Lagoon Beach Hotel)

*** End of Assessment ***