



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

SOUTH AFRICA

Commented [INS 11]: 43/50 = 86%

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 - It is initiated by the board by a board resolution. Section 129(1) of the Companies Act 2008 provides that "... the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if the board has reasonable grounds to believe that - (a) the company is financially distressed; and (b) there appears to be a **reasonable prospect of rescuing the company**". Section 129(2) provides that "... resolution ... has no force or effect until it has been filed". Therefore, the proceeding becomes effective only upon filing of the resolution with CIPC.
- Compulsory business rescue proceedings – An affected person may file an application to the court to place the company in a compulsory business rescue. Section 131(1) of the Companies Act 2008 provides that "... an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings". An affected person is defined in section 128(1) of the Companies Act 2018 as "a shareholder or creditor of the company ... any registered trade union representing employees of the company ... any employees ..."

Commented [INS 13]: 2

Question 2.2 [maximum 8 marks]

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

- There is no quantitative (monetary) threshold set under the Companies Act 2008.
- Section 128(1)(b) defines “business rescue” means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for ... (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:**”
- In brief – the business rescue scheme provides for (a) if the debtor business can be “saved” such that it will continue as a going concern and (b) if the debtor cannot be “saved”, the rescue scheme is able to result in a better return to the creditors or shareholders as compared to the return in liquidation.
- In the case of *Griessel and Another v Lizemore and Others* [2015], the court laid down criteria to be satisfied in relation to “better return for shareholders or creditors”. In this case, the court in paragraph 79 stated –

79. In my view the words “or, if it is not possible for the company to so continue in existence” qualify when the alternate objective of providing a better return may be relied upon. In other words, it is for the person who wishes to place a company under business rescue on this alternative ground to satisfy three criteria;

a. that the company is financially distressed as required under section 129(1)(a);

b. that it is not reasonably likely (or perhaps possible) for the company to be rehabilitated and continue in existence on a solvent basis as contemplated in section 128(1)(b)(iii). *[It was not necessary to argue the appropriate threshold test];* and

c. that the development and implementation of a plan to rescue the company would result in a better return for creditors or shareholders than would occur from its immediate liquidation.

- Voluntary business rescue proceedings – Under section 129(1) of the Companies Act 2008, it provides that a company may be placed under business rescue scheme “... if the board has reasonable grounds to believe that - (a) the company is financially distressed; and (b) there appears to be a **reasonable prospect of rescuing the company**”. The court in *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd* [2013] stated in paragraph 29 as “... it requires more than a mere *prima facie* case or an arguable possibility ... it must be a reasonable prospect ... which means that it must be a prospect based on reasonable grounds. A mere speculative suggestion is not enough. Moreover, because it is the applicant who seeks to satisfy the court of the prospect, it must establish these reasonable grounds ...”. This case was also cited in a subsequent court decision in *Newcity Group v Allan David Pellow NO* [2014].

Commented [INS 14]: 7.
Could have discussed financial distress.

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]

Commented [INS 15]: 10

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

The land on which the smelting operations are located

- Security over the land (specific immovable property) can be created by way of a mortgage bond (special mortgage). The creation of security by special mortgage must be (a) in writing (b) be attested by the Registrar of Deeds and (c) recorded in the register at the Deeds Office. While the ownership of the property remains with ABC Limited, the fact that the land is subjected to the security and the loan (mortgage) amount will be recorded in the title deed of the land.
- XYZ Bank is likely to take several factors into account when taking the land as security, and they include (a) the market value and force sale value of the land (b) in the event of default, the ease of disposal (how easy or difficult is it to find a buyer) (c) whether to obtain a third-party independent valuation of the value of the land and (d) the value of the building (if any) built on the land.

The existing freestanding and movable smelters

- General notarial bond (GNB) – Security by way of a general notarial bond can be created. In this form of security arrangement, ABC Limited continues to retain possession of the smelters. The security (smelters) may include smelters acquired after the GNB. The security provided is “not perfected” (remains incomplete) until certain subsequent steps are taken (see below). Therefore, the smelters can still be alienated (sold) without the consent XYZ Bank. The effect of such security arrangement is that while the bondholder (XYZ Bank) is not placed in a secured creditor status in insolvency, it does provide the XYZ Bank a preferent claim under the Insolvency Act. From the practical standpoint, this type of arrangement provides ABC Limited some flexibility in that the loan could be used in anticipation of future expansion (purchasing of more smelters).
- Special notarial bond (SNB) - Security by way of a SNB can be created over the smelters (specific identifiable smelters). To be valid, the notarial bond must be (a) executed

notarially (b) registered with the Deeds Registry and (c) registered within three months of execution. The effect is that XYZ Bank will be a secured creditor and has priority right over unsecured creditor. However, to qualify as SNB as a secured creditor, the court held that the bond had to specify and describe the property to enable it to be readily recognisable or a third party must be able to identify the property by reference to the document alone: see the Supreme Court of Appeal case of *Ikea Trading und Design v BOE Bank* [2005]

- From the commercial standpoint, XYZ Bank is likely to want to have a SNB unless ABC Limited can justify why GNB is more suitable for the business. Further, XYZ Bank is likely to consider the market value and force sale value of these smelters (including whether there is a market for them) if the debtor defaults. As the smelters are movable, XYZ Bank will also consider the integrity of management of ABC Limited – this is to avoid a situation where management fraudulently move (dissipate) or sell the smelters to a third party.

100% shares in one of its subsidiaries, DEF Limited

- A pledge can be provided to XYZ Bank to secure payment of the loan. The creation of a pledge is by way of a valid and binding pledge agreement. There will be a delivery of the shares in DEF Limited to the pledgee (XYZ Bank). There is however no registration or notification requirements. The pledge agreement will also spell out the rights and obligations of the parties, in particular the rights to the pledgee (XYZ Bank) in relation to the underlying security (the shares in DEF Limited) in the event of default of payment. XYZ will also take possession of the shares in DEF Limited.
- A pledge (session in security) can be created by ABC Ltd in the form of bare dominium (where the legal title remains with ABC Limited) or in limited cases, an out-and-out cession (where the title is transferred to XYZ Bank subject to the share being transferred back to ABC Limited transferring the share back to ABC Limited when the debt owing is discharged).
- In considering whether XYZ Bank will take shares as security, it would want to find out various commercial aspects (a) whether the DEF Limited is making money (P&L and cash flow analysis) and whether it has assets (balance sheet analysis) (b) would it be difficult to realise the commercial value of the DEF Limited shares in the event of default considering the nature of DEF Limited business (c) would it be difficult take control the business of DEF Limited if the management of DEF Limited is not co-operative and (d) would the co-operation of the management of DEF Limited be essential to preserve the business value?

Various business insurance policies

- Pledge / a cession agreement may be entered into between ABC Limited and XYZ Bank, providing XYZ Bank with cession (contractual rights) over the insurance proceeds. There is no registration or public notification requirement. For the cession to be secured, XYZ Bank (the pledgee) must take possession of the policy documents.
- XYZ Bank should notify the insurance company of its interest upon completion (perfection) of the loan documentation that the insurance proceeds (if any) fall under a security cession agreement (pledge). This notification should be accompanied by a written notification from ABC Limited of the cession (pledge) arrangement. If there is an insurance claim by ABC Limited in future, the insurer will pay XYZ Bank the proceeds, who has the contractual rights under the cession agreement.

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.)

The secured creditor, XYZ Bank, who holds the security must give notice to the Master of the High Court and liquidator (if one has been appointed) that it holds the security before the second meeting of creditors. However, a secured creditor generally may realise movable property itself.

The land on which the smelting operations are located

- Security by way of a mortgage bond (special mortgage) – In the event of default, the XYZ Bank will apply to the court to obtain a judgment and request for the execution of the judgment (authorisation to have the land sold). The land will be sold in execution (after informing ABC Limited), and the proceeds of the sale be used to discharge the amount owing to XYZ Bank. If there is any deficit, XYZ Bank may file a “proof of debt” claim with the liquidator for the deficit sum.
- From the practical standpoint, XYZ Bank may want to work with the liquidator and ask whether he is willing to sell the land on behalf, the proceeds of the sale will be used to discharge the debt owing. If there is a surplus, it belongs to the estate of ABC Limited. If there is a deficit, ABC Limited will file “proof of debt” claim for the deficit sum. The costs incurred by the liquidator in realising the security will be borne ABC Limited.

The existing freestanding and movable smelters

- General notarial bond (GNB) – XYZ Bank will obtain a “real right of security” (becoming a secured creditor in the event of insolvency) upon perfecting the GNB. Perfection is done through - (a) make an application to the High Court to attach the property (b) take possession of the property via an attachment by the High Court and (c) take physical possession of the property. Upon perfection, XYZ may proceed to sell the property.
- Special notarial bond (SNB) – Generally, the secured creditor can enforce the security by selling the secured assets without the court order (as the security is already perfected - Security by Means of Moveable Property Act 1993). The proceeds of the sale will be used to discharge the amount owing to XYZ Bank. The deficit if any, XYZ Bank may file a “proof of debt” claim with the liquidator.

Commented [INS 16]: 3.

Could have included discussion in re consequence of possible out-and-out cession of the shares, as well as instances where creditor may realise proceeds itself.

- In the alternative, XYZ Bank may want to work with the liquidator and ask whether he is willing to sell the smelters on behalf, the proceeds of the sale will be used to discharge the debt owing. If there is a surplus, it belongs to the estate. If there is a deficit, ABC Limited will file "proof of debt" claim. The costs of realising security incurred by the liquidator will be borne ABC Limited.
- From the practical standpoint, the secured creditor is likely to obtain a better value by selling the land and smelters together (as a business operation) as opposed to a break-up sale.

100% shares in one of its subsidiaries, DEF Limited

- XYZ Bank could sell the shares of DEF and use the proceeds to pay for the loan. If there is a surplus, it will be returned to the liquidator. If there is a deficit, XYZ Bank will file "proof of debt" claim for the deficit.

Various business insurance policies

- Pledge / a cession agreement – XYZ Bank will inform the liquidator of its interest as pledgee. To the extent that there is an insurance claim, and the money will be paid by the insurer, XYZ Bank will be entitled to the money as the pledgee.

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, –

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

Commented [INS 17]: 13

Could have included discussion on Sackstein v Proudfoot

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.

Whether the court might recognise the foreign proceedings or the foreign officeholder

- South Africa has adopted a version of the UNCITRAL Model Law on Cross-Border Insolvency under Cross-Border Insolvency Act 42 of 2000 (“CBIA 2000”). Certain conditions are to be met before CBIA can come into force. These conditions have not been met - the CBIA has not come into force yet.
- Currently, the law relating to cross-border insolvency is governed by common law principles. The liquidator in NZ (Mrs B) may make an application in the South African court to have the liquidation order recognised or her position as liquidator (foreign officeholder) recognised in South Africa based on the common law principles: See the case of *Overseas Shipholding Group, Inc and 180 others*.
- The process of the application is that the High Court will issue a *nisi* (temporary) ruling. It will publish the application by Mrs B, inviting all interested parties to appear before court if there is a cause on why the court should not grant the recognition under the application. It is noted that the court had on occasions granted the final recognition without the initial *nisi* ruling. If there is no objection or opposition from interested parties, the court in South Africa may grant the recognition.
- If the court in South Africa recognises the liquidation order and her position as the liquidator of Money Problems NZ, it would give her a legal standing (in court) and control of assets in South Africa, as may be stated in the court order.

Whether the court might order the liquidation of Money Problems SA (an external company) given the current liquidation of Money Problems NZ

- The fact that it is an external company would not prevent the court from winding it up. In the case of *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd* [1998], the court held that Companies Act provides that the court in South Africa may wind-up an external company.
- If the assets relate to movable properties, the court is likely to grant the recognition (unless contested, see below). If the assets relate to immovable property in South African, the court may to grant the recognition if there are “exceptional circumstances” or “if it is convenient”.
- While it is not clear on the facts whether the assets in South African consist of fixed or movable assets, the facts of the case suggest that Money Problems SA is insolvent (a local creditor intends to wind up the company due to inability to pay its debts).
- If Mrs B makes an application the recognition as a foreign proceeding and for her to be appointed as the foreign representative, the court will issue a *nisi* (temporary) ruling. It will publish the application by Mrs B, inviting all interested parties to appear before court if there is a cause on why the court should not grant the recognition under the application. On the facts, there is a creditor who intends to apply to the court to wind up the company. It may be that that Mrs B recognition will be objected to by the creditor. The court might decide to wind up the company and appoint a local liquidator to take charge of the assets. At the same time, the court may grant Mrs B recognition as a foreign representative, giving

Mrs B a *locus standi* in South Africa, empowering her to work through the assets in South Africa with the local liquidator.

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

- In considering whether to recognise a foreign proceeding, the court in exercising its discretion, will consider various factors, and that include the following:
 - Whether it is equitable and convenient for the estate to be wound up elsewhere.
 - Whether a single proceeding would be preferred – a winding up order may be refused if a single liquidation order would be more convenient. In coming to conclusion of factor of convenience, the court will have regard to the interest of local creditors, whether they are well protected if it is recognised a foreign proceeding as compared to a local winding-up.
 - The court will have regard to the principle of comity and equity.
 - Other factors to consider on recognition includes (a) the judgment (liquidation order) and appointment of Mrs B must be final and conclusion in New Zealand (b) recognition will not be contrary to public policy or natural justice (c) judgement was not obtained fraudulently and (d) enforcement will not offend Protection of Business Act 1978

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

- The content of a possible declaratory order will generally provide for (a) powers of the foreign office holders (Mrs B) (b) the duties that she has to carry out (c) the need for Mrs B to provide security for the performance of her functions and (d) an order requiring that money can only be transferred out of South Africa with the approval of the Master.
- Specifically, the order of the court may include powers and duties relating to (a) meeting of creditors (b) proof of debts (c) sale of assets (d) distribution of proceeds. Samples of the declaratory order can be found in *Moolman v Builders & Developers (Pty) Ltd* [1990]; *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* [2015].

Additional facts and how these facts would affect my advice to Mrs B

- The facts indicate that Money Problems NZ has assets in South Africa. It does not indicate whether the assets are movable or immovable. If the assets are movable, recognition is likely to be granted. If the assets are immovable, the court in South Africa may recognise the foreign proceeding if there are exceptional circumstances. The court will have regard to the factor on convenience when deciding on the recognition (whether it falls under exceptional circumstances).
- Another fact that would be useful is whether the interest of the local creditors will be well protected under the foreign proceeding as opposed to a local liquidation order.

- There may be messy “intra-company” transactions between Money Problems NZ and Money Problems SA, thus creating a conflict when there is one single liquidator (Mrs B) administering the estates of these both Money Problems NZ and Money Problems SA. Creditors in South Africa may not be comfortable that she would be able to discharge her duties effectively due to the potential conflict. It may be better that another insolvency practitioner be appointed in South Africa to take charge of the assets of Money Problems NZ in South Africa.
- The credentials and availability of resources are important factors in administering an insolvent estate. The facts do not indicate whether she has the knowledge of South African laws and whether she has resources in South Africa to be able to carry out the work. If Mrs B intends to make the application in South Africa, she would be advised to demonstrate to the court that she has the ability (knowledge and skills) and the resources to be able to do the work (carrying out the duties as a liquidator).

*** End of Assessment ***