



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D**

**SOUTH AFRICA**

Commented [INS 11]: 22/50 = 44%

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.

[Under the South Africa Insolvency Act, sequestration proceedings may commence either by means of voluntary surrender or compulsory. Under the Companies Act 2008, this entails the likelihood that the company unable to continue in existence, have potential to give creditors better return or shareholders.

In voluntary surrender refers to the insolvency debtor surrender for a sequestration order to surrender the debtor's estate for the benefit for creditors subject to high court approval while compulsory sequestration involves the one or more creditors who approach the court for sequestration order.]

### Question 2.2 [maximum 8 marks]

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

[Under the South Africa Insolvency Act, sequestration proceedings may commence either by means of voluntary surrender or compulsory. Under the Companies Act 2008, this entails the likelihood that the company unable to continue in existence, have the potential to give creditors a better return or shareholders.

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No discussion of BR

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In voluntary surrender refers to the insolvency debtor surrendering for a sequestration order to surrender the debtor's estate for the benefit of creditors subject to high court approval while compulsory sequestration involves the creditors or one or more approaching the court for a sequestration order.

First of all, there is no threshold for a company to enter business rescue proceedings for voluntary surrender under the South African Insolvency Law. The debtor must be able to prove beyond any reasonable doubt that there will be sufficient "free residue" to cover the cost of proceeding and that the sequestration will be to the advantage of creditors.

*Free residue is basically the portion of the estate which is not subject to any right of preference by reason of any special mortgage, legal hypothec, pledge or right of retention". Also for sequestration to be to the advantage to creditors "yield at least, a not non-negligent dividend".<sup>1</sup>*

*In terms of Compulsory sequestration, the creditor must be able to prove the following according to Act 9 (1) of the Insolvency Act,<sup>2</sup>*

- (i) That he has liquidated claim at least ZAR 100 or if two or more creditors are applying, they must have liquidated claims against the debtor amounting, in aggregate, to not less than ZAR 200
- (ii) That there is reason to believe that sequestration will be the advantage of creditors<sup>3]</sup>

### 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 the Insolvency Act, a security is defined as", in relation to the claim of a creditor of an insolvent estate, means property of that estate over which the creditor has a preferent right by virtue of any special mortgage, landlord's legal hypothec, pledge or right of retention;"<sup>4</sup>

<sup>1</sup> Insolvency Act 24 of 1936 (SA), s6(1)

<sup>2</sup> Ibid, s 9 (1)

<sup>4</sup> Ibid, s 2

**Commented [INS 15]:** 5.  
Incorrect application of law to facts; hypothecs and retention right not applicable. No discussion on SNB or cession in *securitatem debiti*.

The securities available to creditors are Special Mortgage in all its forms, Pledge (including a cession made in securitatem debiti), Hypothec (including both that of a landlord and in terms of the National Credit Act) and Right of retention.

The brief distinction among the following are; "a pledge basically means a bailment of goods as security against while hypothecation is a charge created on the movable property without delivering them to the lender and mortgage is the transfer of an interest in specific immovable property as security against a loan."<sup>5</sup>

Mortgage bond are the "right of security over immovable property necessary for the mortgage bond to be registered against the title deed of the property in the Deed Office which office is responsible for registration, management and maintenance of the property registry in South Africa". Here, such immovable property hypothecated may not be transferred without the bond being cancelled or the written consent of the mortgage bondholder."

In notarial mortgage bond, is in respect to movable property while a special notarial bond is required to be registered under section 1 of the Security by Means of Movable Property Act (1993).

ABC Limited owns the following unencumbered property provided for the following security charge :

- (i) the land on which the smelting operations are located; - Mortgage bond
- (ii) the existing freestanding and movable smelters; - Hypothecs
- (iii) 100% shares in one of its subsidiaries, DEF Limited; - Pledge
- (iv) various business insurance policies – Pledge

Hypothecs Under section 84 of "confers preference to a creditor against an insolvency estate. Hypothec is created ex lege and the parties do not have to specifically agree to it in order for it to be constituted." Here the Act provides that should the property be delivered to a debtor under the transaction, that is an instalment agreement, such transaction is regarded on the sequestration of the debtor's estate as creating in favour of the creditor a hypothec over that property where the amount still outstanding under the transaction is secured". Under Hypothecation, the property remains with the borrower. For instance, movable property such as vehicles, stocks among others are subject of hypothecation). In view of this, should XYZ Bank (ii)the existing freestanding and movable smelters; - Hypothecs

A pledge is the "right of security over movable corporeal property may be created by the delivery of the property concerned to the creditor and the pledge remains effective for as long as the creditor remains in possession of the property." <sup>6</sup>Here the creditor is in possession of the property until full payment of the debt by the debtor. For example, shares of a company, Insurance policies, among others. Clearly, out-and-out cession requires that the right of ownership is transferred to the creditor but with pledges it remains with the debtor, The effect is under out-and-out cession, during sequestration, the creditor becomes the legal owner of the and can realise the property on the other hand, in terms of pledge, the creditor becomes a secured creditor of the debtor's estate. From the above, (iii)100% shares in one of ABC Limited subsidiaries, DEF Limited will be taken and (iv) various business insurance policies will be entered in agreement as a pledge.

<sup>5</sup> Retrieved (25/07/2022) " Difference between Pledge, Hypothecation and Mortgage" <https://finacle.in/blog/difference-between-pledge-hypothecation-and-mortgage/>

<sup>6</sup> Sharrock, Business Transactions Law (8<sup>th</sup> edition, Juta 2011) 754 , captured in pg 10 of INSOL Foundation Course – South Africa



Right of retention arises when a creditor or lien holder acquires possession of another's property, moveable or immovable, and expends money or labour on it, and makes improvements to it, while it is in his possession. Here the lien holder has the right to take control over the property until they are fully repaid. Here, the parties do not have to agree specifically as it is created ex lege. There is no registration required.

**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.)*

[Movable property, the secured creditor must notify in writing to the Master and trustee of their claim to the movable property before the second meeting. In some instances, the creditor is required to realise the property still needs to prove the claim under Article 44. On the contrary, a creditor is required to deliver the property to the trustee and must still prove a claim against the estate.

Immovable property, in this case, the secured creditor may not realise the property personally when the trustee is appointed. Here the secured creditor must prove the claim over the value placed on the property within three months of the appointment of the trustee or from the date of the claim to take over the property. When the trustee does not within that period take over the property, he has to realise it for the benefit of all the creditors whose claims are secured in their respective class of rights.

(i) the land on which the smelting operations are located

From the above, XYZ Bank must prove their claim over ABC Limited land on which the smelting operations are located in order not to fall in the general pool of assets for the trustee to realise it for the entire creditors.

(ii) the existing freestanding and movable smelters;

A secured creditor holding movable property to secure this claim must inform the Master and trustee in case one is appointed. In instances such as these, the creditor may realise the movable property himself but in other circumstances, he may not.

(iii) 100% shares in one of its subsidiaries, DEF Limited; and (iv) various business insurance policies, must petition the Master or the trustee and attach their claim to the above and since the (iii) is a 100% shareholding of a subsidiary of ABC, can file for enforcement of the right to take possession of the company and such can be realised and in case the Master is unable to guarantee such, XYZ Bank.]

**Commented [INS 16]: 4.**

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.

**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.

[(a) A foreign bankruptcy order in South Africa (SA) or order or the recognition of a foreign officeholder by a South African court does not make the debtor insolvent in South Africa. Also, the recognition of the officeholder in SA does not automatically guarantee that foreign insolvency order to influence the proceedings in SA. The office holder must apply to the SA Court for recognition.

To grant that application, the qualifications of the foreign officeholder are decided according to the law of the country where he or she was appointed and not according to the law of the country where his or her appointment is recognised and the officeholder must provide security for proper performance.

“Recognition is a declaratory order regarding the foreign officeholder entitlement, subject to the local requirement, to administer the assets as though they were in the relevant foreign jurisdiction from which he derives his authority.”

In the case *Moolman v Builders & Developers (Pty)*, the court granted the office holder an order for recognition. Similarly, *Lehane NO v Legoo Beach Hotel (Pty) Ltd*, the courts granted the officeholder recognition after applying to the courts.

Mrs. B would need to apply to the High Court and with appropriate security be granted the power to administer the property situated in SA with the local applicable Law.

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<sup>7</sup> Ibid, pg 55

**Commented [INS 17]:** 11  
Could have included discussion on *Sackstein v Proudfoot* and content of order.

(a) The Court may grant the necessary powers to be able to administer the property situated in the court's jurisdiction and having provided the security to the satisfaction of the Master.

*Lehane NO v Lagoon Beach Hotel (Pty) Ltd* provides an example of the type of order which the court may grant when a foreign officeholder applies for recognition.

Foreign representative was empowered, after providing security to the Master "To administer the estate of the insolvent in respect of all his assets which are or may be found or situated within SA"<sup>8</sup>

"With all rights under the Insolvency Act, including Section 64 (insolvent and others to attend meetings of creditors), 65 (interrogation of insolvent and other witnesses), 66 (enforcing summonses and giving of evidence), 69 (trustee must take charge of the property of the estate) and 82 (sale of the property after second meeting and manner of sale); and to administer the estate of the insolvent as if a sequestration order had been granted against him by SA Court"

Also, in the case *Ex parte LaMonica v In re Eastwind Development SA (Baltic Reefers Management Lth Intervening)*, the court held that the officeholder required recognition by an order of South African court before the foreign officeholder was entitled to deal with local assets and confirmed that the court exercises discretion and is guided by grounds of comity and convenience. The court further held that according to information before it, it had no reason to believe that the applicant was not acting bona fide and that the applicant would fail in their duties if they did not pursue claims that he regarded as valid. Therefore, the consideration of comity and convenience favoured the order sought by the applicant and the application succeeded".<sup>9</sup>

In view of this, once Ms B is able to secure the order for recognition and show course for comity and convenience in the application, the court might order the liquidation of Money Problems SA given the current liquidation of Money Problems NZ.

(c) The following are some factors that the court will take into consideration when drawing a conclusion.

The South African Courts may be persuaded by the following factors when drawing conclusions from the above procedure.

First, there must be equitability and convenience, the assets must be in South Africa, and preference for a single proceeding directed by the court of domicile.

The SA court will exercise its powers and may decide to refuse or grant the sequestration on grounds of equitable or convenience should the court establish that the respondent was not found to have been resident within the jurisdiction of the court. That in view, this may be considered by the court when drawing the conclusion.

Secondly, the assets which the Mrs B seeks to pursue must be located in SA. From the above, Money Problems SA Limited is a subsidiary of Money Problems NZ Limited, in drawing a conclusion, the court may consider whether the assets of the company are indeed in SA.

Thirdly, the court may consider whether there is a single proceeding directed by the court of domicile. Under the case of *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd*, "the court expressed a preference for a single concursus creditorum, but refused recognition because application was not made timeously. It was decided in terms of Companies Act 1973"<sup>10</sup>

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<sup>8</sup> Ibid INSOL pg 55 para 3

<sup>9</sup> *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* 2015(4) SA 72 (WCC) as captured in pp 56 of INSOL Foundation Course – South Africa

<sup>10</sup> *Ward v Smit: In re Gurr v Zambia Airways Corp Ltd* 1998 (3) SA 175 (SCA) 183H, as captured in pg 54 of INSOL

(d) " A recognition order is a declaratory order regarding the foreign officeholder's entitlement, subject to local requirement, to administer the assets as though they were in the relevant jurisdiction from which he derives his authority"<sup>11</sup>. These requests are made through the courts.

Once the declaration orders are granted, Ms B will be able to hold meeting of creditors, request and validate proof of debts, and through the applicable law of SA sell assets, and in case of immovable assets, must seek leave of court, write to the Master to be able to transfer those rights, to be able to enforce summons and giving of evidence under section 66, administering the insolvency estate just to mention but a few. In *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* the court granted the declaration order which empowered the officeholder to perform under the SA Laws.

In conclusion, Mrs B would be able to obtain recognition and be able to perform under the SA insolvency proceedings to allow convenience and equitability<sup>12</sup>.  
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**\* End of Assessment \***

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<sup>11</sup> Ibid pp 55 para 2

<sup>12</sup>idem