



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.

A voluntary business rescue is commenced once the board of directors of the company file its resolution to voluntarily commence business rescue proceedings with the Companies and Intellectual Property Commission whereas a compulsory business rescue is commenced once a court order is made after 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.

Chapter 6 of the Companies Act, 2008 sets out that a business rescue means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for:

- a) the temporary supervision of the company, and of the management of its affairs, business and property;
- b) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
- c) 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

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Could have discussed reasonable grounds of the board; application for liquidation when practitioner no longer has reasonable grounds.

in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company.

Considering that a business rescue proceeding is to rehabilitate a financially distressed company, it stands to reason that the threshold to enter business rescue proceedings relates to the financial standing of the company at the time of application for a business rescue proceeding. So what does it mean for a company to be financially distressed? The Companies Act, 2008 defines a company as financially distressed if it appears to be reasonably unlikely that the company will be able to pay all of its debts at they fall 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.

The Court is its discretion to make an order placing a company under supervision and commencing business rescue proceedings will consider the following:

- a) the court is satisfied that the company is financially distressed;
- b) that the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or
- c) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing 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]

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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 will be considered immovable property of which security can only be obtained through mortgage bond. ABC Limited must execute a mortgage bond which will thereafter be entered in the appropriate register and endorsed against the title deed of the land. A mortgage bond does not transfer the title deed to XYZ Bank but confers rights to XYZ Bank to sell the land and apply the proceeds to settle or reduce the debt. By virtue of the mortgage bond, a debt given by XYZ Bank will be secured against the property. This allows XYZ Bank to enforce its security outside the context of bankruptcy and insolvency proceedings making it quicker and more cost-effective.

The existing freestanding and moveable smelters are considered tangible moveable property and the types of securities that can be created include pledge, general notarial bond and special notarial bond. A pledge is established by entering into a valid agreement and delivery of the tangible moveable property to the lender. As the smelters are instrumental in the operations of ABC Limited's business, a pledge would not be suitable as delivery of the smelters to XYZ Bank would not be practical. A general notarial bond is a mortgage over all of a borrower's tangible movable property while a special notarial bond is created over a specifically identifiable tangible moveable property. As the smelters can be specifically identified, a special notarial bond should be considered as it constitutes real security.

As shares and business insurance policies are intangible moveable property, security may be created by a pledge or a cession in security. Both are created by an agreement between the borrower and lender and there are no formal requirements to perfect the security. It is important to differentiate between a cession in *securitatem debiti*, where the ownership of the property remain in the borrower's hand, and an out-and-out cession, where ownership of the property transfers to the lender until discharge of the debt after which the ownership transfers back to the borrower. In an out-and-out cession, the lender becomes the legal owner of the property when the borrow is sequestrated and realise the property without heeding insolvency proceedings. XYZ Bank should consider the out-and-out cession as it provides the best security over the intangible moveable property.

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.)

If a mortgage bond is created over the land, XYZ Bank must first take possession of the land through a court order directing the sheriff of the High Court to attach the asset. XYZ Bank can then sell the land and apply the proceeds against the outstanding debt. A special notarial bond created over the moveable smelters, pledge or cession in security created over the shares and business insurance policies can be enforced by XYZ Bank without prior judgement against or in pursuit of ABC Limited. XYZ Bank can then procure the sale of the secured asset and apply the proceeds to settle or reduce the debt.

However, the commencement of insolvency proceedings places a moratorium on the enforcement of security. By virtue of the liquidation order against ABC Limited, XYZ Bank cannot realise the security it has but must deliver the secured assets to the liquidator for realisation. XYZ Bank will have to inform the Master of the High Court and the liquidator of the security it holds before the second meeting of creditors. The liquidator will then pay the

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

proceeds from the realisation of the secured assets less liquidator's fees to XYZ Bank, in preference to other creditors.

There is a provision in the Insolvency Act that allows a secured creditor to realise certain types of security. If the property consists of a marketable security, bill of exchange or financial instrument, the secured creditor can realise the secured assets before the second meeting of creditors. If XYZ Bank has security over the shares in the subsidiary (DEF Limited), they can sell the shares through a stockbroker before the second meeting of creditors. XYZ Bank will then pay the proceeds to the liquidator and will then be entitled a payment of the proceeds upon proving a claim to the liquidator against ABC Limited.

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.

In order to deal with assets of Money Problems NZ in South Africa, Mrs B must first be recognized by South African law as the foreign representative of the foreign proceeding i.e. liquidation of Money Problems NZ. While South Africa has enacted a version of the UNCITRAL Model Law on Cross Border Insolvency in the form of the Cross-Border Insolvency Act 42 of 2000 ("the Act") which provides easy access to foreign representatives to apply for recognition of a foreign proceeding, foreign states have to be designated under the Act for it to take effect. To date, there are no states designated and as such, Mrs B's only avenue is to make an application to the High Court for recognition before dealing with the assets located in South Africa. The South African courts exercise their own discretion in hearing such an application

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Could have included discussion in re conclusion whether order will be granted.

and will consider comity, convenience and equity and strive to ensure the the rights of local creditors are protected. A foreign representative must be able to prove to the court that they were validly appointed in a foreign proceeding in the state where the company in question has its registered office or is their principal place of business. From the information provided, there is a likely chance that Mrs B may be recognised as a foreign representative.

In relation to the winding up of an external company, the Supreme Court of Appeal in *Sackstein NO v Proudfoot SA (Pty) Ltd [2003] 2 All SA 59 (SCA)* set out that:

- a) despite that the registration of an external company in South Africa does not create a separate legal personality for the external company, an external company may be wound up in South Africa independently from its foreign counterpart, even where the foreign entity is not wound up; and
- b) the assets of the external company based in South Africa may be treated separately from that of the foreign company.

However, there is a preference for single bankruptcy proceeding and the South African courts had in fact previously set aside a local winding up order where the local applicant failed to disclose that the company was incorporated in a foreign company and was already in liquidation (*Overseas Shipholding Group, Inc and 180 others*). Considering the mentioned case law and the facts provided, there is a chance that the South African courts may not order the liquidation of Money Problems SA considering the liquidation of Money Problems NZ.

However, the South African courts will consider the following factors when coming to a decision to recognise any foreign proceeding:

- a) that it would be more equitable and convenient for the insolvent to be sequestrated elsewhere, if the insolvent is a resident outside South Africa;
- b) preference for single proceeding directed by court of domicile and the courts may consider this if the rights of local creditors are protected as if the foreign proceeding was a local winding-up order;
- c) assets in South Africa not a prerequisite for recognition; and
- d) an order for recognition would be a mere formality if the foreign company had moveable properties in South Africa but the for immoveable property, the courts will apply its discretion.

A recognition order given the South African courts are usually in the form of a declaratory order on the foreign representative's entitlement to deal with the foreign company's assets subject to local requirements. The entitlements given to the foreign representative is to the discretion of the court and could be different depending on the application by the foreign representative. An example of a declaratory order is given in *Lehane NO v Lagoon Beach Hotel (Pty) Ltd* where the foreign representative was entitled:

- a) to administer the estate of the insolvent in respect of all his assets which are or maybe found or are situated within South Africa;
- b) with all rights under the Insolvency Act; and
- c) to administer the estate of the insolvent as if a sequestration order had been granted against him by a South African court.

*** End of Assessment ***