



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

SOUTH AFRICA

Commented [INS 11]: 40/50 = 80%

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]

Commented [INS 12]: 8 marks

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.

- 1) Voluntary business rescue is initiated by the board of a company upon the passing of a resolution to this effect and the proceedings become effective once this resolution filed with the Companies and Intellectual Property Commission (CIPC), Section 129.
- 2) Compulsory business rescue is initiated by a court order after an application is brought by an affected person such as 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, Section 131.

Question 2.2 [maximum 8 marks]

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

Commented [INS 13]: 2

Commented [INS 14]: 8

Business rescue was introduced to facilitate the rehabilitation of a company that is financially distressed by providing for—

1. temporary supervision of the company, and of the management of its affairs, business and property;
2. a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
3. 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

The business rescue proceeding can be commenced as discussed in question 2.1 above. Pursuant to section 131(4)(a) the court may make an order placing the company under supervision and commencing business rescue proceedings if the court be satisfied that:

- I) The company is financially distressed;
- II) 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;
- III) It is otherwise just and equitable to do so for financial reasons and there is a reasonable prospect for rescuing the company.

"Financially distressed" in reference to a particular company at any particular time, means that-

- it appears to be reasonably unlikely that the company will be able to pay all of its debts as 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.

Many court decisions have refused business rescue, stating that the company was hopelessly insolvent and thus there was no reasonable prospect of success. In the Gormley case, the court held that, the provisions of the Act make it clear that the concept of business rescue only applies to companies which are financially distressed as defined in the Act. If a company is not so financially distressed the provisions of Chapter 6 of the Act will not apply. Thus, the court adopted a narrow interpretation of 'financially distressed' and held that a company that is already insolvent, even if only able to pay its debts over an extended period, is not financially distressed as defined in the Act.

In order to qualify for business rescue, the company must be financially distressed. However, the main requirement is that there be a "reasonable prospect" for rescuing the business. The prerequisites of section 131(4)(a) for a rescue order are that:

- any one of sub-sections (i), (ii) or (iii) must be fulfilled (above); and
- the court must be satisfied that there is a reasonable prospect of rescuing the company concerned.

As such, the requirement for a reasonable prospect of rescuing the company must be present, irrespective of which of sub-sections (i), (ii) or (iii) is applicable. It has become evident that business rescue is an alternative option for companies facing insolvency.

The meaning of a 'reasonable prospect' has been decided in a number of cases such as Southern Palace Investments, where the court held that a 'reasonable prospect' for rescuing

the company indicates something less than a 'reasonable probability' which was required for placing a company under judicial management under the old 1973 Companies Act. Thus, one main reason for the failure of judicial management under the old Act is due to the high threshold set by the legislature and thus the threshold of a 'reasonable prospect' under the Act is easier to satisfy.

In the case of *Southern Palace Investments 265 (Pty) Ltd v Midnight Storm Investments 386 Ltd 2012 (2) SA423 (WCC)* the judge stated the The court states that the applicant must deal with "concrete and objectively ascertainable details in support of business rescue and which facts are beyond mere speculation". These facts should include -

- "the likely costs of rendering the company able to commence with its intended business or to resume the conduct of its core business";
 - the availability of "cash resources" to enable the company to meet its daily expenses and the nature of the funding on which the company will rely;
 - "the availability of any other necessary resources, such as raw materials and human capital";
- and
- "the reasons why the proposed business rescue plan will have a reasonable prospect of success".

The court went on to state that without such details, a court is not only unable to consider the prospects of the company continuing in existence on a solvent basis but is also unable to consider the alternative aim of securing a better return for the creditors of the company than would arise from a liquidation.

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.

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

The land on which the smelting operations are located is consider as "immovable property". Further the mineral in the land (gold) which is intangible is also consider as immovable property. Security over immovable property can only be obtained by a special mortgage. The "special mortgage" includes the following:

- IV) a mortgage bond for any immovable property;
- V) a notarial mortgage bond for specially described movable property in terms of section 1 of the Security by Means of Movable Property Act 57 of 1993; or
- VI) a notarial mortgage bond for specially described movable property registered before 7 May 1993.

A special mortgage over the land can be created by a mortgage bond. A mortgage bond is perfected by registering it deeds registry where the immovable property over which the bond is granted is registered. No other method can confer a valid security over immovable property. A mortgage bond does not transfer title in the mortgaged immovable property to the lender. It confers a limited real right on the lender to have the immovable property sold in execution, and the proceeds of that sale applied to settle, or reduce, the debt secured by the mortgage bond. The mortgage bond will specifically indicate the debt that the property is security for including the amount of debt secured

(ii) the existing freestanding and movable smelters

The existing freestanding and movable smelters is considered as tangible movable property which can be moved from place to place without damage to itself. The common forms of security that can be granted over tangible movable property are as follows:

- a. General notarial bond. A general notarial bond is a mortgage by a borrower of all of its tangible movable property in favour of a lender as security for a debt or other obligation. However, a general notarial bond does not (in the absence of attachment of the property before insolvency) make the lender a secured creditor of the borrower. Consequently, it is not a true mortgage of movable property, but is a means of obtaining a limited statutory preference above the claims of concurrent creditors in the borrower's insolvent estate
- b. Special notarial bond. A special notarial bond is a mortgage which:
 - Is created over the tangible movable property (which can be specifically identified) of a borrower as security for a debt or other obligation.
 - Meets the requirements outlined in the Security by Means of Movable Property Act 1993.
 - Is registered under the Deeds Registries Act 1937 (DRA).

A special notarial bond (once registered) constitutes real security in the mortgaged property as effectively as if it had been expressly pledged and actually delivered to the lender. Title to the movable property remains with the borrower, subject to the lender's security interest. The property subject to a special notarial bond must be specifically identified readily recognisable. The test of specifying and describing the movable property as provided for in section 1(1) of the Act is set out in the *Ikea Trading und Design v BOE Bank*¹⁴ (hereafter referred to as *Ikea Trading*).

The DRA does not prescribe a particular form for this bond. It must be registered in the manner prescribed in the DRA and must be registered at the deeds registry within three months after the date of its execution.

As the freestanding and movable smelters can be specifically identifiable, a special notarial bond shall be given for these assets.

(iii) 100% shares in one of its subsidiaries, DEF Limited

Shares are considered as intangible movable property/movable incorporeal property. The security over shares are usually created by pledge or cession in security. This takes place where a personal right is ceded as security for the payment of a debt. This form of security, is created by agreement between the debtor and the creditor and there is no registration requirement for its validity.

Shares in companies are issued in certificated form (evidenced by a physical share certificate) or uncertificated form (transfer thereof takes place by way of electronic entry in a central securities depository). Security over certificated shares can be created by way of a pledge agreement. Security over uncertificated shares is created by way of a security cession agreement and notation in the pledgor's securities account. Note that the doctrinal nature of cession in *securitatem debiti* is akin to that of a pledge. The agreement between the debtor and creditor should clearly mention whether the cession is an out-and-out cession or whether the cession is in fact a pledge of a personal right, as the effect thereof is important upon sequestration of the debtor's estate. If the cession is an out-and-out cession, the creditor becomes the legal owner of the right and can realise the incorporeal property in his own name without having to initiate any insolvency proceedings. If the cession is a pledge, then the creditor becomes a secured creditor of the insolvent estate.

As a practical step to enable the enforcement of security, the share certificates together with a share transfer form signed by the pledgor (and left blank as to transferee) are delivered to the pledgee. In accordance with the Financial Markets Act, 2012, a security interest over uncertificated shares is established by way of electronic entry in the securities account where the shares are held.

(iv) various business insurance policies.

A security interest over insurance policies can be created by a security cession agreement. The nature of the security is similar to the security given for shares as discussed above.

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.)

At the commencement of insolvency proceedings, a moratorium is placed on the enforcement of security against the insolvent company.

Once insolvency procedures commence, a secured creditor holding movable or immovable property as security may not as a general rule realise that security itself, but must deliver it to

Commented [INS 16]: 3

Could have included discussion in re consequence of possible out-and-out cession of the shares, as well as more information on sale of immovable property.

the liquidator of the insolvent debtor for realisation. The secured creditor must give notice to the Master of the High Court and the liquidator, that the creditor holds the security before the second meeting of creditors. Once the liquidator realises the secured property, the liquidator must pay the proceeds (less the liquidator's fees) to the secured creditor, in preference to other creditors.

Section 83 of the Insolvency Act provides for alternative procedures regarding the realisation of certain types of property held as security. For example, if the property consists of a marketable security (i.e., property that is ordinarily sold through a stockbroker), a bill of exchange, or a financial instrument, the secured creditor can, before the second meeting of creditors, sell the property through a stockbroker (or if the creditor is a stockbroker, through another stockbroker).

After realising the property, the secured creditor must forthwith pay the net proceeds to the liquidator. Provided that the secured creditor can prove a valid claim against the insolvent's estate, the secured creditor will be entitled to a payment out of the proceeds of such realisation.

Section 35B of the Insolvency Act imposes a statutory netting of all obligations arising under certain master agreements. Obligations incorporated in the netting would include those of a transferee of security to return the security to the transferor. The security that is pledged, mortgaged or bonded to a secured party cannot be included in netting.

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.

Commented [INS 17]: 11
Could have included discussion in re comity, convenience and equity; 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.

South Africa applies common law principles in dealing with cross borders insolvency. The type property and the classification of person determines whether the foreign representative is allowed to deal with the south African's assets. Movable property is governed by the law of natural person's domicile (lex domicile). The movables of a debtors is divested throughout the world and South Africa when the court of his domicile declared the debtor is insolvent. As a matter of principle it will be prudent for foreign representative to seek recognition from South Africa court before dealing with local assets. For company The place of incorporation is replaced for place of domicile but the principle place of business may afford jurisdiction even if the place of registered office is elsewhere. The representative of a debtor that is juristic person is obliged to seek such recognition and has no authority to deal with local assets until the recognition is granted. He must show that he was appointed where the company is registered or has its principle place of business and that his claim is genuine. The South Africa court does not decide whether the appointment of foreign representative is valid, however it may be decide in proceedings that such representative may bring after he has been recognised. Immovable property is governed by the law of the place where the immovable property is situated (lex situs). The sequestration of an estate outside South Africa does not divest immovable property of insolvent in South Africa.

A foreign officeholder seeking recognition in South Africa must apply to the high court. The high court will grant a rule nisi to issue and publish the application, calling on all persons concerned to show any cause against the granting of the application. However, the court also have granted the recognition order without issuing a rule nisi such as the recognition order granted in Priestley v Clegg 1985(3). The order will reflect the conditions for the protection of local creditors. The remaining assets and moneys after payment of the various charges, costs and proved claim may be removed from South Africa only with the written consent of the Master or the court. The court order will be endorsed by the Master if satisfied that the foreign officeholder has furnished appropriate security.

In South Africa only the foreign officeholder is recognised and not the foreign proceeding. Foreign proceedings however been recognized by South African courts and this can be seen in overseas shipholding Group Inc matter. Foreign bankruptcy order has no influence on proceedings in South Africa. However, a single insolvency proceeding is preferred. This is supported when the court in the case of Leydsdorp & Pietersburg Ltd (In Liquidation) on the application of a foreign officeholder set aside a local winding up order granted ex-parte where the local applicant failed to disclose that it was incorporated in a foreign country where it had already been placed in voluntary liquidation.

The South African court take into consideration the following factors when drawing conclusion on foreign proceedings recognition.

1. Equitable and convenient if insolvent if resident of South Africa
The court would more readily exercise its discretion and refuse to grant a Sequestration order on the ground that it will be it could double or convenient for the estate to be sequestrated elsewhere, if the respondent was not found to have been resident within the jurisdiction of the court.

2. *Preference for single proceeding directed by court of domicile*

The court of the domicile should direct the main sequestration and that all other decrees should be ancillary or subsidiary. If debtor has virtually no assets outside of south Africa and his only asset in South Africa is immovable property where in office order has not been appointed in a foreign country and application has not been made for recognition in South Africa, The matter should be adjudicated in South Africa. In the matter of Donaldson versus British South African Asphalt and Manufacturing Co Ltd , the winding up order was refused and was concluded that a single liquidation order would be more convenient and the interests of local creditors would be as well protected in the foreign proceeding as if a local winding up order had been granted. In Ward v Smit: In re Gurr v Zambia Airways Corp Ltd the court expressed a preference for a single *concursum creditorum*, but refused recognition because application was not made timeously. It was decided in terms of the Companies Act 1973 that a South African court had 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.

3. Assets in South Africa not a prerequisite for recognition

In *Moolman v Builders & Developers (Pty) Ltd*⁴²⁵ the foreign officeholder was authorised to hold an enquiry into the affairs of the insolvent or company in terms of South African law even though the insolvent company did not have any assets in South Africa. *If order was granted by the court of domicile when the insolvent has only movables assets it is a mere formality, but for immovable property the court will apply its discretion.* There must be exceptional circumstances and considerations of convenience before foreign proceedings will be recognized if the foreign order was not granted by the court of the domicile.

Foreign bankruptcy order or the recognition of a Foreign officeholder by a South African court does not make the debtor an insolvent in South Africa. The qualifications of a foreign officeholder are decided according to the law of the country where he was appointed and not according to the law of the country where his appointment is recognized. The recognition order is a declaratory order regarding the foreign officeholders entitlement. The Foreign Office order will have to request the court grant him the necessary powers that will enable him to administer the property situated in the court's jurisdiction. *Moolman v Builders & Developers (Pty) Ltd* provides for the type of order which the court make grant when a foreign officeholder applies for recognition. The rights defined by South African insolvency law in favour of the Master, a creditor, and an insolvent or company being wound up, in regard to:

- meetings of creditors;
- proof, admission and rejection of claims;
- sale of assets;
- plans of distribution of proceeds; and
- the rights and duties of a trustee or liquidator concerning those matters, exist in relation to the administration as if the law applied that thereto pursuant to a Sequestration or Winding up order granted on the date of the recognition order.

*Lehane NO v Lagoon Beach Hotel (Pty) Ltd*⁴³² provides another example of the type of order which the court may grant when a foreign officeholder applies for recognition. The foreign representative was empowered, after providing security to the satisfaction of the Master:

- to administer the estate of the insolvent in respect of all his assets which are or may be found or are situated within South Africa;

- with all rights under the Insolvency Act
 - sections 64 (insolvent and others to attend meetings of creditors),
 - Section 65 (interrogation of insolvent and other witnesses),
 - Section 66 (enforcing summonses and giving of evidence),
 - Section 69 (trustee must take charge of property of estate) and
 - Section 82 (sale of 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 a South African court.

*** End of Assessment ***