



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

**SOUTH AFRICA**

Commented [INS 11]: 31/50 = 62%

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.

- (i) **Voluntary Business Rescue**  
The decision to file for the opening of the voluntary business rescue needs to be adopted by the board of directors of the concerned company and then submitted to the Companies and Intellectual Property Commission (CIPC). The proceedings become effective upon filing of the resolution of the board of directors. Within five business days after the filing of the resolution, the company has to appoint a business rescue practitioner who will supervised the company.
- (ii) **Compulsory Business Rescue**  
Compulsory business rescue is initiated by the court and the respective application for the opening of such proceedings is filed by an affected person, who can be a shareholder, creditor, an employee, a creditor or a registered trade union. A compulsory business rescue commences once the application has been filed with the court.

### Question 2.2 [maximum 8 marks]

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

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Commented [INS 14]: 3

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

The main objective of the business rescue is to enable a restructuring of the company in financial distress in the way that it will be in the capacity to keep doing business in ordinary course and thus existing on a solvent basis.

In order for a company in financial distress to benefit from the regulation on business rescue, the company must be:

- (i) reasonably unlikely to be able to pay all its debts as they fall due and payable within the ensuing six months, or
- (ii) reasonably likely to become insolvent within the immediately ensuing six months.

### 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 could be subject of a mortgage bond. Indeed, mortgage bonds are securities used for the immovable properties such as the land used for smelting gold in the case at hand. The XYZ Bank will have to enter into an agreement under which XYZ Bank agrees to provide ABC Limited with a loan and XYZ Bank agrees to pass a mortgage bond over its land as security for repayment of the received loan.
- (ii) Existing freestanding and movable smelters and DEF Limited could be subject of a pledge and/or a notarial bond.
  - Notarial bonds are used to secure claims related to movable property and they are either special or general. The special notarial bond needs to be attested by a notary public and registered in the Deeds Registry. Once registered, the notarial bond is considered pledge to specific secured creditor. The secured creditor will have a secured claim in case of insolvency of the debtor and the bond could be used to satisfied it.
  - The general notarial bond may also be registered. However, it does not grant the creditor a secured position in case insolvency proceedings over the assets of the debtor. In fact, the information related to this security are described in a general way.

#### Commented [INS 15]: 7

Could have included more information in re formalities of mortgage bond; preference for either GNB or SNB; unpractical nature of pledge.

- The 100% shares in one of its subsidiaries, and the various business insurance policies:
- Since the Security by Means of Movable Property does not provide any information with regard to the question whether notarial bonds should be restricted to “corporeal movable property” or be extended to “incorporeal movable property”, one may assume that the legislator had no intent to make such a restriction. Thus the shares and the business insurance policies could serve as security under a notarial bond. However, such a notarial bond is not afforded the security provided for in section 1 of Act No. 57 of 1993 (see RCR 15 of 2004, Bond registered in respect of “incorporeal things”). In case of insolvency of the ABC Limited, XYZ Bank, as unsecured creditor, would only be entitled to a preference over the concurrent creditors with respect to the proceeds of property.
- The business insurance policies and the shares: security could be created by way of a cession made “in securitatem debiti” or “cession as security for a debt”. In this situation, ABC Limited would cede certain rights with regard its position as shareholder and payment right with regard to the insurance policies. However, cession agreement should stipulate whether the cession is an out-and-out cession or whether the cession is in fact a pledge of personal right, depending on the effect such agreement should have on the position of XYZ, as creditor, in case of insolvency of ABC Limited.

**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.)*

- (i) Upon appointment of the liquidator, the latter will proceed with the sale of any movable and immovable property of ABC Limited. Before proceedings with the distribution, the liquidator will first consider the rights and the interests of the secured creditors.
- (ii) XYZ as secured creditor:
  - The mortgage bond related to the land on which the smelting operations are located provides XYZ Bank with a secured claim. Once the land is sold, XYZ would have a preferential claim to the proceeds of the property. The Bank will be entitled to claim what is due to it. The concurrent creditors will only receive any remaining residue of the proceeds.
  - The special notarial bond related to the existing freestanding and movable smelters and DEF Limited also confer XYZ a secured claim.

**Commented [INS 16]: 4**  
 Could have included discussion in re instances where creditor may realise proceeds itself.



- The pledge of the (uncertified) shares and the business insurance policies as an out-and-out-cession would provide YZ Bank the position of a secured creditor and legal owner of the respective ceded rights. Thus, in this case, XYZ could even proceed with the realisation of the ceded property in its name.

(iii) XYZ as unsecured creditor:

- In case the loan has been secured by way of general bonds using the existing freestanding, the movable smelters, DEF Limited, XYZ would be considered as an unsecured creditor during this liquidation proceedings.
- The use of the shares and the business insurance policies, as movable incorporeal property, to secure the loan by way of general bond, would also provide XYZ the position of an unsecured creditor.

**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.

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.

Recognition of foreign proceedings and possible conclusions of the court:

A foreign judgement is not automatically enforceable in South Africa. The liquidator willing to enforce a judgement in South Africa needs first to file for an application for recognition to the High Court.

The recognition process foresees that interested parties have to demonstrate cause before a set date as to why the recognition order should not be made final (rule nisi).

**Commented [INS 17]:** 7  
 Could have included discussion on factors that court will take into consideration; Sackstein v Proudfoot; possible content of court order

This rule aims at protecting local creditors, who have to be notified of the intention of the foreign liquidator to administer the assets of the insolvent.

The court has absolute discretion as to whether recognition should be granted and the court can request that certain conditions protecting local creditors such as the publication of a notice to concerned creditors be published in the Government Gazette and local newspapers; (b) provide of appropriate security for creditors, are to be fulfilled.

The courts apply the principles of comity, convenience and equity in exercising their discretion to recognise the liquidator. In the case at hand, we do not have sufficient information as to whether the application of the liquidator does contain any measures considering the interests of local creditors. Due to the lack of information, it is not possible in the case at hand to assert that the court will grant the liquidator the possibility to administer the assets located in South Africa.

#### Liquidation of Money Problems SA

The court may dismiss the application for the opening of insolvency proceedings in South Africa if it is more convenient to only have one single liquidation proceeding. The court may dismiss an application for the opening of insolvency proceedings in South Africa if it is of the opinion that creditor interests are sufficiently or better considered in a foreign proceeding.

In case that a local creditor files an application for the opening of insolvency proceedings in South Africa, the foreign creditor can also file an application to set aside this application.

In the case at hand, we cannot determine whether creditors of Money Problems SA are better protected by the foreign proceedings. Thus we cannot assume with certainty that the court will grant an order for the opening of the liquidation proceedings.

**\* End of Assessment \***