



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

SOUTH AFRICA

Commented [INS 11]: 47/50 = 94%

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.

<https://www.werksmans.com/wp-content/uploads/2013/04/Werksmans-Basics-of-Business-Rescue.pdf>

Companies Act 2008 – Section -129, 131
Insol page 42,43

Voluntary:

The business rescue is initiated by the board of directors of the company. The board of directors resolve that the company voluntarily commence business rescue proceeding and be placed under business rescue practitioner (Section 129 of the Act). The proceeding becomes effective on the filing of this resolution with the Companies and Intellectual Property Commission (CIPC)

Compulsory: (Section 131 of the Act)

This is initiated by the court order upon the formal application to court, for placing the company under supervision and commencing business rescue proceedings. This application is brought by an "affected person".

Commented [INS 13]: 2

“Affected person”: The shareholder, creditor, registered trade union representing employees or any employees not represented by a trade union are classified as “Affected person.” The application must be served on the company and CIPC. The “Affected persons” must be notified.

This is initiated if the company has not already been placed under business rescue in terms of section 129, on the basis:

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

Question 2.2 [maximum 8 marks]

Commented [INS 14]: 8

Briefly set out and explain the **threshold** for a company to enter business rescue proceedings. Insol page 42,43

Section 128, 129, 131 of Companies Act 2008

https://www.gov.za/sites/default/files/gcis_document/201409/321214210.pdf

The threshold for a company to enter business rescue is that whether or not the company is financially distressed. A company should commence business rescue proceedings at the first signs of it being financially distressed, within the meaning of the Act.

The act describes that a company is financially distressed (Section 218(1) (f)):

- if it appears that it is reasonably unlikely that the company will be able to pay all its debts as and when they fall due and payable within the ensuing six months, or
- if it appears reasonably likely that the company will become insolvent within the immediately ensuing six months.
In the case of *Welman v Marcelle Props 193 CC JDR 0408 (GST)*, the court stated that “business rescue proceedings are not for terminally ill close corporations. Nor are they for chronically ill. They are for ailing corporations, which given time will be rescued and become solvent”.
- This statement supports the contention that at the first signs of financial distress, a company should apply for business rescue.
After a company becomes more than “financially distressed”, options other than business rescue become more attractive for ailing companies, such as liquidations or compromises.

The Companies Act 2008 clearly states that rescuing a company involves the “maximizing” the chances of the company continuing in existence on a solvent basis or, where it is not possible for the company to continue as a solvent company, it would result in a better return for the creditors and shareholders than that would result from an immediate liquidation of the company.

Business rescue proceeding may thus be used where:

- Company is in financial distress and there is a reasonable prospect that by business rescue the company will continue to exist on a solvent basis.
- Where there is no reasonable prospect, the rescue will provide a better result for the shareholders or creditors than in a liquidation scenario.

- Reasonable prospect: The decision of the Western Cape High Court in the case of Southern Palace investments (265) Pty Ltd vs Midnight storms Ltd 2102(2) S4 A23 (WCC) is quite instructive on the nature of evidence required for the court to ensure that an applicant indicates that there is a reasonable prospect of the company being rescued and that the application for rescue is successful. The judge held that:

“...it is difficult to conceive of a rescue plan that will have a reasonable prospect of success of the company concerned continuing on a solvent basis unless it addresses the cause of the demise or failure of the company’s business, and offers a remedy therefor that has a reasonable prospect of being sustainable. A business plan which is unlikely to achieve anything more than to prolong the agony... by substituting one debtor for another without there being light at the end of a not too lengthy tunnel, is unlikely to suffice”. The court went on to state 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 also stated that in the absence of such details, a court is not only unable to consider the prospects of the company continuing in existence on a solvent basis but is not able to consider the alternative aim of securing a better return for the creditors of the company than that would arise from a liquidation.
- the cause of the failure needs to be addressed;
- a remedy for the failure needs to be offered;
- there is a reasonable prospect that the remedy advanced will be sustainable; and
- the above aspects prove, based on “concrete and objective ascertainable details beyond mere speculation”, that the remedy is sustainable.

When an affected person makes an application to court (Section 131 of the Act) and if the court is 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; or
- (iii) it is otherwise just and equitable to do so for financial reasons, and there is a reasonable prospect for rescuing the company; the court can grant an order for business rescue proceedings.

Section 129(1)(b) explains the definition of “Reasonable prospect”:

- means something less is required than that the recovery should be a reasonable probability but would rather indicate a reasonable possibility.

QUESTION 3 (essay-type question) [15 marks]

ABC Limited conducts smelting operations for a local gold mine, which gold mine has recently sunk two new shafts. As a result thereof, the amount of gold ore extracted has increased significantly, and ABC Limited is not able to process all of the ore with the existing smelters that it has. The board of ABC Limited has taken the decision to apply for funding in order to build and install new smelters. ABC Limited's bank, XYZ Bank, has indicated its willingness to provide ABC Limited with the required funds, but subject to a significant security package. ABC Limited owns the following unencumbered property, or has the following available to provide as possible security: (i) the land on which the smelting operations are located; (ii) the existing freestanding and movable smelters; (iii) 100% shares in one of its subsidiaries, DEF Limited; and (iv) various business insurance policies.

Question 3.1 [maximum 10 marks]

Commented [INS 15]: 10

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

Insol page 8-10

[https://www.lw.com/admin/Upload/Documents/Taking%20Security%20In%20Africa/Taking-Security-In-Africa-South-](https://www.lw.com/admin/Upload/Documents/Taking%20Security%20In%20Africa/Taking-Security-In-Africa-South-Africa.pdf#:~:text=Contractual%20Rights%20and%20Insurance%20Proceeds&text=establish%20the%20security.-)

[Africa.pdf#:~:text=Contractual%20Rights%20and%20Insurance%20Proceeds&text=establish%20the%20security.-](#)

[.There%20are%20no%20specific%20requirements%20or%20formalities%20prescribed%20or%20establishing,sufficient%20to%20establish%20the%20security.](#)

The bank in granting the necessary funds should look for appropriate security keeping in mind its position in the event of insolvency:

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

The Insolvency Act provides for "Special Mortgage":

A special mortgage must be considered as security for the land and a "mortgage bond" hypothecating the immovable property is to be secured.

For securing a right of security over immovable property, it is necessary for a mortgage bond to be registered at the deed's Office. The mortgage bond will specifically indicate the debt that is secured over the property, including the amount. Such property may not be transferred without the bond being cancelled or written consent of the bond holder.

The bank may add the clause of parate executie (the right of a creditor to realise a borrower's property without first obtaining a court order).

- (ii) the existing freestanding and movable smelters:

A notarial mortgage bond hypothecates specially described moveable property in terms of section 1 of the Security by Means of Movable Property Act 57 on or after 7 May 1993. Notarial Mortgage bond ensures security over movable property either specifically or generally.

Special Notarial Bond:

A notarial bond needs to be registered in the Deeds office in terms of section 1 of the Security by Means of Movable Property Act 57 on or after 7 May 1993. This bond hypothecates corporeal movable property specified and described in the bond such that it is easily recognizable. The effect of the registration is that the property is deemed to have been pledged to the mortgagee as if it had been expressly pledged and delivered to the creditor.

General Notarial Bond:

A notarial bond may be registered to hypothecate movable property generally. The bond has the general description of the property and is registered in the Deeds office. In case of insolvency this bond is not considered as a "Special Mortgage" with regards to section 22 of the Insolvency Act and the holder is not a secured creditor but has a preferential claim.

If the assets can be easily described in the bond such as high value assets like plant and machinery, the special notarial bond will offer higher security in the event of default or insolvency. Hence that would be recommended for XYZ bank.

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

Pledge:

Movable incorporeal property can be pledged by means of a cession made *in securitatem debiti* or "cession as security for a debt". Rights in shares can be ceded as security for payment of a debt. This form of security is created by agreement between the debtor and creditor and there is no registration requirement for its validity.

Out and out cession: Ownership of the right in action is transferred to the creditor

Pledge: the ownership in the right remains with the debtor and the rights associated with the cession may be exercised by the cessionary upon default of payment. If the cession is a pledge, the creditor then becomes a secured creditor of the insolvent estate on sequestration. In an out and out cession, the creditor becomes the legal owner of the right and realise the incorporeal property in his name without any consideration to the insolvency proceedings. Considering the practical difference between the two constructions of a cession in security, the courts have held that in the absence of clear intention between the parties as to the construction intended, the pledge theory will apply.

Shares in companies in South Africa 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.

XYZ bank needs to take a call on the position it wants to take. In the case of a payment default, XYZ Bank will be a secured creditor in case of a pledge whereas if under an out-and-out cession, XYZ will become the legal owner of the shares in the company without heeding any insolvency proceedings. This may put other considerations on the bank as it may need to involve itself in the company.

- (iv) various business insurance policies.

Insurance Proceeds: A security interest over insurance proceeds can be created by a security cession agreement. Movable incorporeal property may also be pledged by means of a cession made *in securitatem debiti* or "cession as security for a debt". This takes place where a personal right is ceded as security for the payment of a debt. The conclusion of a valid security cession agreement is sufficient to establish the security. The pledgee (XYZ bank) should take possession of the policy documents.

Question 3.2 [maximum 5 marks]

Commented [INS 16]: 5

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.)

[https://uk.practicallaw.thomsonreuters.com/2-384-6156?transitionType=Default&contextData=\(sc.Default\)&firstPage=true#co_anchor_a214836](https://uk.practicallaw.thomsonreuters.com/2-384-6156?transitionType=Default&contextData=(sc.Default)&firstPage=true#co_anchor_a214836)

<https://www.lw.com/admin/Upload/Documents/Taking%20Security%20In%20Africa/Taking-Security-In-Africa-South-Africa.pdf#:~:text=Contractual%20Rights%20and%20Insurance%20Proceeds&text=establish%20the%20security.-.There%20are%20no%20specific%20requirements%20or%20formalities%20prescribed%20for%20establishing.sufficient%20to%20establish%20the%20security.>

<https://www.bowmanslaw.com/article-documents/Finance-Multi-Jurisdictional-Guide-2012.pdf>

As discussed in 3.1 the security given by the company ABC Ltd to XYZ bank can be exercised as follows:

Under the Insolvency Act, s 102. Under South African law creditors in insolvency proceedings may either be secured or unsecured.

Unsecured creditors are further subdivided into preferent (preferential or priority) creditors and concurrent creditors and they rank in this order. Preferent (preferential or priority) claims are paid out of the free residue of the estate, which is that part of the estate which is not subject to the rights of secured creditors. Unlike many other jurisdictions, assets subject to the rights of secured creditors also form part of the estate and are dealt with by the trustee or liquidator. The proceeds of secured assets are ringfenced with the proceeds being paid to secured creditors after the payment of certain costs and expenses.

Enforcement of security

Upon the granting of a sequestration order by the court, the estate of the insolvent vests in the Master. After the appointment of a trustee, the estate will vest in the trustee. The estate that vests in the Master (and subsequently the trustee) consists of the insolvent's property, movable and immovable, including proceeds of property in the hands of the sheriff under a writ of attachment, owned by him at the date of sequestration and all property acquired by the insolvent or accruing to him during sequestration. Unlike the case in most jurisdictions around the world, in South Africa assets subject to security also fall into the insolvent estate. The trustee deals with these assets in the same way as other assets of the estate, except that the proceeds of these assets are ringfenced for payment to secured creditors subject to certain costs being deducted from the proceeds.

Creditors of the insolvent estate must prove a claim against the insolvent estate in order to receive any proceeds from the realisation of estate assets. When creditors hold security for their claims, they must provide details of the security they hold when proving their claims.

A creditor holding movable or immovable property as security cannot realise the security itself but must instead deliver it to the liquidator to realise. A creditor holding movable property must give notice before the second meeting of creditors to the Master of the High Court and the liquidator that it holds the security.

A secured creditor can realise movable property itself provided the following procedures are followed:

- If the property can be sold through a stock broker, the creditor can sell the property before the second meeting
- For financial instruments, the creditor can sell the property itself before the second meeting of the creditors through a financial instrument trader
- For Bill of exchange the creditor can realise it any manner approved by the Master of the High Court or the liquidator
- If property is a right of action, the creditor can only realise it with approval of the liquidator or Master of the High Court.

Any other property can be sold by auction before the second meeting after giving:

1. The liquidator opportunity for inspection
2. Notice of time and place of sale as directed by the liquidator

In instances where the creditor may realise the property himself, he is still required to prove a claim against the insolvent in terms of section 44 of the Insolvency Act. In instances where the creditor does not realise the property himself, he is required to deliver the property to the trustee, after which the creditor must still prove a claim against the insolvent estate. While possession by the creditor is of utmost importance for the validity of a landlord's legal hypothec and a right of retention, by delivering the asset to the trustee, no creditor will lose such security by such act. The creditor is still required to notify the trustee in writing of his rights and further prove a claim subsequently against the insolvent estate.

In the event of default, generally a secured creditor is entitled to enforce its security against the assets over which the security is held. The secured creditor can enforce the security provided, by procuring sale of the assets without procuring a court order and without notifying the security provider and apply proceeds for satisfying the obligation if this is contractually

agreed between the parties. This is known as *parate executie* (the right of a creditor to realise a borrower's property without first obtaining a court order).

This cannot be done for Mortgage bonds, General notarial bonds and Special notarial bonds. In the case of Mortgage bond over immovable property or General notarial bond over all the assets of the entity, the secured creditor must take possession of the secured assets by way of attachment by the sheriff of the High Court under a court order. The secured creditor can then realise the assets and use the proceeds to discharge the outstanding obligation.

A creditor with security over immovable property to secure his claim may not realise such immovable property himself. If such creditor has valued his security when proving his claim, the trustee may, if authorised by the creditors, within three months from the date of his appointment or from the date of the proof of the claim (whichever is the later) take over the immovable property at the value placed thereon by the creditor when his claim was proved. If the trustee does not within that period take over the said property he has to realise it for the benefit of all creditors whose claims are secured thereby, according to their respective rights.

Insolvency Act 1936:

Where a secured creditor realises the security of an insolvent borrower, the creditor must pay the net proceeds to the liquidator. The secured creditor is only entitled to a payment out of such proceeds if its claim is proved under the Insolvency Act.

QUESTION 4 (fact-based application-type question) [15 marks]

Commented [INS 17]: 14
Could have included discussion on *Sackstein v Proudfoot*

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.

Insol pages 51 to 56

Insolvency Act – section 64-66,69,82

Mrs. B will likely need to seek recognition as the foreign office holder and also seek the orders needed from the court for effectively taking control as well as realising the assets of the subsidiary. These are discussed below:

Recognition and Proceeding:

In South Africa, currently the law on cross border insolvency is controlled by common law principles.

The division based on the types of property and classifications of persons determines if the foreign representative may deal with the South African assets. The law of natural person's domicile (*lex domicilii*) governs movable property. If a debtor is declared insolvent by the court of his domicile, he is automatically divested of his movables throughout the world and hence even in South Africa.

The foreign representative will need to seek recognition in South African courts before dealing with the local assets as it has been held as a practice which is now elevated to a principle. The representative of a debtor, that is a juristic person, is obliged to seek such recognition from the South African courts and does not have authority to deal with South African assets until such recognition is granted. The representative must show that he was appointed where the company is registered or has its principal place of business and that his claim is genuine. Whether such appointment is valid, is a decision, not for the South African court in granting recognition, but will be decided in proceedings, that such representative may bring after he has been recognised.

Even if the debtor is an individual or a juristic person, Immovable property is governed by where the immovable property is situated (*lex situs*),. The sequestration of an estate outside South Africa does not divest the insolvent of immovable property situated in South Africa.

On application to the high court by the foreign office holder seeking recognition, the high court will grant a rule *nisi* to issue and publish the application, calling on all persons to show any cause against the granting of the application. However, the court has granted final recognition in some cases without issuing a rule nisi. In the order for recognition, the court will impose conditions for the protection of local creditors and will ensure that the estate is divide equally and dividends are paid out of local assets if sufficient.

The court order is endorsed by the Master if he is satisfied that the foreign office holder has given appropriate security. Assets remaining after payment of charges and proved claims may be removed from South Africa only with the written consent ,of the court or the Master.

In general, a foreign bankruptcy has no influence on proceedings in South Africa. However, it is generally preferred that there should be a single Insolvency proceeding. The court has on occasion set aside a local winding up order on the application of a foreign office holder, which had been granted ex-parte wherein the local applicant had failed to disclose that it was incorporated in a foreign country where it has been already placed in voluntary liquidation.

As per the Insolvency Act, if it appears to the court that it is equitable and convenient that the estate of a person domiciled in a state which has not been designated in terms of section 2

of Cross border Insolvency act, should be sequestered by a court outside south Africa, the court may refuse or postpone the issue of a sequestration order.

In South Africa the foreign office holder is recognised and not the foreign proceeding. There is however a case wherein the foreign proceeding was also granted recognition. (Overseas Shipholding Group, Inc and 180 others, High Court of South Africa, KwaZulu-Natal Division, case reference 12827/12,)

The following factors will help the courts to exercise their discretion when recognising foreign proceedings:

Equitable and convenient if insolvent is resident outside South Africa:

The court can refuse to grant a sequestration order by exercising its discretion, on the ground, that it would be equitable or convenient for the estate to be sequestered elsewhere, if the respondent was not a resident within the jurisdiction of the court.

Preference for a single proceeding directed by court of domicile:

Many cases have expressed the preference for a single forum of administration. The basic underlying rule being that the court of the domicile should direct the main sequestration proceeding and that all other decrees should be ancillary or subsidiary. A winding-up order has been refused where a single liquidation order would be more convenient and the interests of local creditors would be as well protected in the foreign proceedings as if a local winding-up order had been granted. Once a sequestration order is granted, a *concursum creditorum* ("concurrency of creditors") is established and the interests of the creditors as a whole take preference over the interests of individual creditors (Richter NO v Riverside Estates (Pty) Ltd 1946 OPD 209 223). 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.

Assets in South Africa not a pre-requisite for recognition:

In the Moolman v Builders & Developers (Pty) Ltd case the foreign officeholder was granted authority to conduct enquiry into the affairs of the insolvent or company, in terms of South African law, even though the insolvent or company did not have any assets in South Africa. If the bankruptcy order was granted by the debtor's court of domicile it is an important consideration. If the order was granted by the court of domicile and if the insolvent has movables only, the recognition would be is a mere formality, but for immovable property the court will apply its discretion.

Considerations of comity, convenience and equity play an important role in the exercise of the discretion of the court to recognise a foreign officeholder. In Society of Lloyd's v Romahn and two other cases the court held that comity is not applied, though, if it conflicts with public policy.

A foreign bankruptcy order or the recognition of a foreign office holder does not make the debtor insolvent in South Africa. The qualifications of the foreign office holder 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 recognised.

Declaratory Order

The recognition order is a declaratory order regarding the foreign office holders entitlement subject to local requirements to administer the assets as though they were in the relevant foreign jurisdiction from which he is appointed.

- The foreign office holder will have to request the court for the necessary powers needed and to administer the property situated in the courts jurisdiction. The *Moolman v Builders & Developers (Pty) Ltd.* Case gives an example of the of the type of order the court may grant when a foreign office holder applies for recognition.
 - The order will provide that he applicant must provide security for the proper performance of the administration;
 - that thereafter the applicant shall by virtue of this recognition be empowered to administer the said estate in respect of all assets of the said estate which are situated within the Republic of South Africa;
 - that the order of recognition is subject to amendment by the court;
 - that the applicant should comply with the provisions for the opening and operation of banking accounts; and
 - that funds may be transferred out of South Africa with the written permission of the Master.
- The rights defined by South Africa Insolvency law in favour of the master, a creditor and an insolvent or company in winding up with regards to:

- Meeting of creditors
- Proof, admission and rejection of claims
- Sales of assets
- Plans for distribution of proceeds
- Rights and duties of a trustee or liquidator concerning those matters,

exist In relation to the administration, as if the law applied thereto pursuant to a sequestration or winding up order granted on the date of the recognition order.

In the *Lehane NO v Lagoon Beach Hotel (Pty) Ltd.* Case, another example of the type of order is provided, 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 in South Africa
- With all rights under the Insolvency act including sections:
 - 64 - insolvent and others to attend meeting of creditors,
 - 65 - interrogation of insolvent and other witnesses,
 - 66 - enforcing summonses and giving evidence,
 - 69 - trustee must take charge of the property of the estate and
 - 82 - sale of property after second meeting of creditors)
- 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 ***

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