



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

SOUTH AFRICA

Commented [INS 11]: 43/50 = 86%

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]: 10 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.

The commencement of voluntary and compulsory business rescue proceedings differ on the how the process is initiated and by who.

In voluntary proceedings, which is an out of court procedure, is started by the Board of the Company signing a resolution to enter the proceedings and the resolution is filed with the Companies and Intellectual Property Commission. The Company needs to have reasonable grounds to believe the rescue will be successful for the Company.

Compulsory business rescue proceedings are started via a petition to the court from the shareholders or creditors of the Company or employees, who can be represented by trade union or not.

Question 2.2 [maximum 8 marks]

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

Per section 129 of the Companies Act 2008 (the Act), the voluntary rescue proceedings require two elements to be satisfied to enter the proceedings which are:

Commented [INS 13]: 2

Commented [INS 14]: 6
Could have discussed alternative goals of BR; application for liquidation when practitioner no longer has reasonable grounds.

- the company needs to be financially distressed; and
- appears a reasonable prospect of rescuing the company.

Under section 131 of the Act, the two elements to enter compulsory rescue proceedings and for the Court to grant the required order are:

- the company is financially distressed, has not met its financial obligations to an affected party or is just and equitable to do so; and
- there is a reasonable prospect for rescuing the company.

The common elements of both voluntary and compulsory proceedings are that the company is financially distressed to an extent and there is a reasonable prospect the Company can be rescued.

The definition of financially distressed is defined in section 128(1)(f) of the Act and refers to:

- *"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."*¹

The threshold for both business rescue proceedings then need to evidence the company will not be able to pay its debts in the coming six months.

The second threshold to meet is the reasonable prospect of rescuing the company.

While the requirement for a "reasonable prospect" is set out in section 129 (1)(b) of the Companies Act 2008 remains undefined in the legislation, it takes on the meaning that the rescue needs to indicate a reasonable possibility that the Company can be rescued rather than it should be a reasonable possibility.

The process in place in South Africa prior to business rescue, known as judicial management, required a reasonable probability that it will be able to pay its debts or meet its obligations and continue in existence.² The design and interpretation by judges on applications of business rescue proceedings was the threshold was "something less" than required in the former legislative act governing judicial management.³

In the case of *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*, the judge used the term possibility when referring to the threshold for the order to be made, that is a reasonable possibility of rescuing the company.

From the interpretation of reasonable prospect, there only needs to be the possibility of rescuing the company, not a requirement and further detailed in the case of *Newcity Group* confirming the reasonable prospect is to be without speculation. This means that although uncertain, if there is a "possibility or likelihood" of rescue or better return, then the court should exercise its discretion.⁴

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

¹ Section 128(f) of the Companies Act 2008

² Section 427 of the 1973 Companies Act

³ *Oakdene Square Properties (Pty) Ltd v Farm Bothasfontein (Kyalami) (Pty) Ltd*

⁴ *Newcity Group (Pty) Ltd v Pellow, China Construction Bank Corporation Johannesburg Branch v Crystal Lagoon Investments 53 (Pty) Ltd 9*

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.

If advising ABC Limited on the security that may be taken for the funding of the new smelters, ABC Limited need to ensure they have the correct security for each type of property and understanding what the security will be granting.

Depending on the value of the funding provided, XYZ Bank may want to take security over all four items below. Each item is detailed with the respective 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.

For Item I, XYZ Bank would likely request a mortgage bond over the land of the smelting operations due to the land being immovable property. A mortgage bond will secure the land to XYZ Bank with a registration against the title of the property and lodged with the Deeds Office, the responsible body for the property register in South Africa. For ABC Limited, they need to consider that the amount of debt will be registered on the bond with the title and the property cannot be transferred without the permission of XYZ Bank or the bond being cancelled. This is likely the most attractive security for XYZ Bank as the mortgage bond prevents the property being sold without XYZ Bank's permission and is registered with the Deeds Office.

For Item II, XYZ Bank would likely consider a special notarial bond over the existing and moveable smelters, due to their characteristic of being moveable and readily recognisable. A special notarial bond, secures a moveable asset such as the smelters and specifically registers property that is readily recognisable, i.e. the smelters are described specifically in the bond. This type of security will be registered with the Deeds Office and the smelters will be deemed to have been pledged to XYZ Bank. With the smelters being pledged to XYZ Bank, the effect is that the smelters will remain property and in possession of XYZ Bank until the secured debt has been paid off. Due to the obvious commercial reasons, in practice the smelters will remain in possession of the ABC Limited and can be used by ABC Limited rather than being held by XYZ Bank. The possession element has to be agreed with the special notarial bond.

Commented [INS 15]: 9
Could have included discussion as to why traditional pledge is not applicable.

For Item III, since the shares are not material objects but are transferrable, XYZ Bank can take either a pledge or out and out cession over the subsidiary shares. The rights to the shares in the subsidiary would be granted to XYZ Bank and ABC Limited need to consider the practical consideration of a out and out cession where XYZ would become the legal owner of the right to shares and does not need insolvency proceedings to be commenced to realise them. With a pledge, XYZ Bank would only be secured creditors of the estate, still protecting their right but without the legal ownership. For XYZ Bank, being a secured creditor under a pledge may be sufficient for the shares and legal ownership may have other implications for them which they do not want to deal with.

For Item IV, similar to Item III, the various business insurances policies are non material and as security a pledge or out and out cession can be taken against them. As ABC Limited can grant the right to the payments from the insurance policies, a pledge can be taken by XYZ Bank. Consideration needs to be given as to whether the legal ownership of the right to the insurance policies is important in security considerations for XYZ Bank or if the pledge and subsequent secured creditor in an insolvent estate is sufficient.

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.)

Under the assumption that XYZ Bank was able to get the respective types of security requested, XYZ Bank would need to do the following in the liquidation:

1. Prove in the estate for the respective securities and provide details of the security.
2. For the mortgage bond over the land, XYZ Bank will not be able to realise the property themselves. XYZ Bank will need to value its security when proving for their claim in the liquidation, and with creditors permission, the liquidator can take over the property for the value claimed, within three months of appointment or three months from the date of the claim. If the liquidator did not take over the property within the set period, the property is released to all secured creditors and can be realised according to their respective rights.
3. For the special notarial bond, pledge or cession must let the liquidator know as soon as possible. Only financial instruments that are defined as securities can be realised by creditors themselves for movable property. The rest will need to be realised by the Liquidator and will need to submit their own claim in the estate. A creditor is not disadvantaged by delivering the property to the liquidator for realisation as part of the process.

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

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

Under the present circumstances, there needs to be multiple considerations from both Mrs B and the South African High Court before recognition could be granted and the subsidiary, Money Problems SA can be dealt with. To conclude an opinion that may be reached by the South African High Court four specific considerations of foreign judgments will be reviewed.

1. To consider is if the court will recognise the foreign proceedings or the foreign officeholder.

The relevant facts that need to be explored are whether Mrs B as Liquidator is classified as a natural person or a juristic person. This determines how Mrs B approaches the court, either as Liquidator or a corporate representative of Money Problems NZ and the type of recognition required to deal with movable or immovable assets. As Liquidator of Money Problems NZ and with Money Problems SA Limited is a subsidiary, the asset held are shares in a company. The shares in Money Problems SA would be considered movable property as they can be transferred to another party quite easily. Although as a juristic person, on behalf of Money Problems NZ, the application is obliged to seek recognition and cannot deal with the South African assets until the courts have granted the recognition.

The facts of the case do not go into whether there are other movable or immovable assets of either Money Problems NZ or SA. In the circumstances, the shares were the only South African asset to deal with being a movable asset as a juristic person. The court would be able to exercise its discretion in regards to immovable property for Mrs B and grant Mrs B a

recognition order if meeting the criteria and wanting to deal with immovable property too. More information is needed to guide on this aspect.

Mrs B's qualifications will also be decided against the laws of New Zealand to be an appropriately qualified foreign officeholder. Mrs B will also need to provide appropriate security for the recognition.

The steps that need to be taken in this process for Mrs B to get recognition is to apply to the High Court in South Africa for recognition. The High Court will make the recognition application unless persons can show reason why the application should not be granted. Per case law, unless Money Problems SA is not aware of the proceedings to get foreign recognition, the order for the recognition to Mrs B as liquidator should be granted. On the facts above and to the comment that the affairs are convoluted, it needs to be clear if Money Problems SA is aware of the application to give it the chance for the hearing before any recognition order is made.

From the facts of the case, Mrs B will not have the New Zealand judgement recognised on grounds of reciprocity because South Africa has only designated Namibia as the only country where this is the case. In the case of Mrs B seeking recognition and Money Problems NZ being a New Zealand parent company, the enforcement of foreign judgement will only occur through common law action.

2. To consider whether the court might order the liquidation of Money Problems SA given the current liquidation of Money Problems NZ.

The insolvency proceedings over Money Problems NZ, does not automatically mean that Money Problems SA is insolvent, nor does it mean the subsidiary has to be wound up on insolvency grounds. The granting of the recognition of the foreign judgment allows Mrs B certain powers and rights to protect, realise and distribute assets. Further details are also required of the creditor's claim against Money Problems SA. This may change the view of the court when considering the recognition of the foreign proceeding. The details of the creditor's claim and its impact on Money Problems SA is also important to know as the creditor may have a claim against Money Problems SA but that does not mean that the Money Problems SA is insolvent. There are further criteria that need to be met for the court to grant a winding up application on behalf of that creditor too.

3. Factors that the court will take into consideration when drawing a conclusion.

The court will look into four main factors as to whether it should exercise its discretion whether to recognise a foreign proceedings:

- (I) The resident needs to be found to be a resident of the jurisdiction of the Court. In this case, Money Problems SA would need to demonstrate it is domiciled in South Africa which may include its head office, operations or customers. The facts of the case are limited on this matter and state that it is an external company which may influence whether a court dismisses the application based on if it was convenient and equitable to be recognised elsewhere.
- (II) The South African High Court has a preference for a single proceeding directed by the court of domicile. Again depending on the comity of Money Problems SA, would determine whether the court will recognise the foreign proceeding. The Court's preference is to have control of South African assets located mainly within South Africa without an officeholder appointed in a foreign country. The facts of the case are different in this matter as it will be a subsidiary of the Money Problems NZ. If

the assets of Money Problems SA are located in South Africa for example, the court may be more obliging to grant the recognition order.

- (III) That assets are not required to be located in South Africa as a prerequisite for recognition. The main piece of case law that demonstrated this example was *Moolman v Builder & Developers (Pty) Ltd*⁵ where inquiry was allowed into the South African company even though there were no assets present in South Africa.
- (IV) The South African High Court considers whether the debtors court of domicile has granted the order and if the insolvent company only has moveable assets. As per before, the details of Money Problems NZ, only listing the movable asset of shares in Money Problems SA, it is difficult to provide an opinion without more information of other assets of both entities.

When making a declaratory order, which is granting the recognition order, the court grant the entitlement subject to safeguards that allow Mrs B to deal with the assets like they were in New Zealand. Mrs B would need to seek approval from the Court to deal with property in South Africa. Example of a recognition order in this case if granted would be that:

- Mrs B could administer the assets of Money Problems NZ within South Africa;
- Be granted the powers under Insolvency Act to attend meeting of creditors, investigate the insolvent, give evidence, take change of property and sell property through a prescribed manner of sale.
- administer the estate as if a winding up order was granted in South Africa.

Further information is required on the type and location assets of Money Problems NZ and SA and the solvency of Money Problems SA to determine if an order for recognition will be granted.

*** End of Assessment ***

⁵ *Moolman v Builders & Developers (Pty) Ltd (in Provisional Liquidation)*