



SUMMATIVE (FORMAL) ASSESSMENT: MODULE 7D

SOUTH AFRICA

Commented [INS 11]: 33.5/50 = 67%

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.

Commented [TG3]: Two years

Commented [TG4]: 6 months

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.

Voluntary proceedings are brought by the debtor directly – ie the Company.
Compulsory proceedings are brought via a third party to the Court – ie one or more creditors.

Question 2.2 [maximum 8 marks]

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

Business rescue pursuant to Companies Act 2008

Business rescue can be voluntary -by the Board of Directors
Or Compulsory – initiated by court after an application brought by an affected person

Business Rescue must be used where:

- The Company is under financial distress, and the business rescue plan has a reasonable prospect of returning to company to solvent basis
- There is no reasonable prospect of returning to solvent basis but the business rescue will provide for a better return to creditors than liquidation

Commented [INS 15]: 1.5 marks.
Voluntary = proceedings not brought, but via board resolution.

Commented [INS 16]: 4 marks.
Could have discussed meaning of financial distress; reasonable grounds of the board; application for liquidation when practitioner no longer has reasonable grounds.

The business rescue plan must be provided to creditors, and a meeting must be held to establish votes in favour/otherwise to the plan. The plan will be legally binding to all creditors in so far as the voting thresholds are met, these are set out below:

- 75% of voting interests and 50% of independent creditors voting interest if there are connected interested within the first vote of 75%.

Voting is only by those creditors whose rights, and therefore returns, are affected by the business rescue plan. If the claim will be paid in full the claim holder has no rights to vote as their interests are not affected.

A creditor (affected person) or combination of creditors may make an offer to purchase the interests of other creditors in order to 'sit in their shoes' and vote for a higher percentage. The purchaser therefore adopts the debt within the arrangement by paying in full the creditor for which claim there are taking over. This is independent from the plan and funds from the plan and/or Company in proposed plan are not utilised for same.

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.

The following forms of security are available for each of the proposed assets:

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

XYZ Bank could register a Mortgage Bond over the land. This will need to be registered against the title deed of the property at the deeds office. ABC Limited will not be able to sell the land without consent of XYZ bank. In an insolvency proceeding the claim would be classed as secured and therefore would not form part of the estate available to the body of creditors (although this would be dealt with by the liquidator, no other creditor would have claims on the funds from the land until XYZ's claims were paid in full)

- (ii) the existing freestanding and movable smelters;

Commented [INS 17]: 8
No distinction between preferability between SNB or GNB;
unpractical nature of pledge.

XYZ bank could have a Notarial Mortgage Bond registered in terms of taking security over the smelters as they are a moveable asset. This could be:

- *Special notarial bond; or*

In order to register a special notarial bond the asset must be 'described in the bond in a manner which renders it easily recognizable'. As the asset is a large piece of machinery this will be easily recognizable and able to identify as such. The notarial bond will be registered in the deed's office in terms of section 1 of the Security by means of Movable Property Act on or after 7 May 1993. In an insolvency situation, the assets is deemed to have been pledged and delivered to the creditor and therefore will form a secured claim even though the creditor is not in possession.

- *General notarial bond*

A general notarial bond will be registered at the deeds office, this is usually in cases where the asset would be described 'generally', in an insolvency proceeding this would not be a secured claim and the asset would be taken into the estate, and the claim would sit as preferred in the unsecured claims.

- (iii) 100% shares in one of its subsidiaries, DEF Limited; and various business insurance policies.

Security available in relation to shares and insurance policies would fall under a pledge by means of a cession means in *securitatem debiti*. This is an agreement between the parties and does not require registration. This could be 'out-and-out cession' or 'pledge of personal right'. With out-and-out the ownership would transfer to XYZ, however with a pledge the ownership would remain in the possession of ABC, with XYZ only having rights of recourse should ABC default.

When considering the implications should there be an insolvency of ABC Limited, the 'out-and-out' provides for the recovery of the asset outside of the liquidation proceedings as the ownership has been fully transferred.

However, it should be considered that there may be intercompany balances between the Companies and the security granted may not result in the best possible return.

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.)

Commented [INS 18]: 3.
Could have discussed how to deal with the immovable property.

Type of security granted: *Mortgage the land on which the smelting operations are located*

Following the application for liquidation of ABC Limited in the High Court, the estate would rest with the Master. As there would be a moratorium following the liquidation order no enforcement can happen outside of the liquidation proceedings.

XYZ Bank will need to submit their claim to the Master/office holder before the second meeting of creditors. Under section 44, XZY should provide to the office holder proof of claim, this should be done as soon as possible but no later than before the second meeting of creditors.

All the assets form part of the estate, therefore the office holder will deal with the recovery, however there will be no bearing on the funds receiver – ie the office holder can not take fees from secured assets without the consent of the charger holder, in this case XYZ Bank.

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

Money Problems NZ Limited (Money Problems NZ) is a company duly registered in terms of New Zealand company law. Money Problems SA Limited (Money Problems SA) is registered in South Africa as an external company and is a subsidiary of Money Problems NZ. Money Problems NZ was placed under liquidation in New Zealand on 31 August 2020 as a result of inability to pay its debts. Shortly thereafter Mrs B was appointed as the liquidator of Money Problems NZ. On 17 October 2020 a creditor of Money Problems SA made it clear that he intended approaching the High Court in South Africa for an order to wind-up Money Problems SA in terms of the Companies Act 61 of 1973 on the ground that it is unable to pay its debts. Mrs B has not yet approached the High Court in South Africa for recognition. The affairs of Money Problems NZ seem to be rather convoluted and only on 10 October 2020 did Mrs B come to learn that Money Problems NZ has assets in South Africa. Mrs B plans to apply to the South African High Court for recognition in due course.

You are required to draft an opinion addressed to Mrs B on the possible conclusions that may be reached by the South African High Court under the present circumstances. Your opinion should include specific reference to, among other things, –

- (a) whether the court might recognise the foreign proceedings or the foreign officeholder;
- (b) whether the court might order the liquidation of Money Problems SA given the current liquidation of Money Problems NZ;
- (c) factors that the court will take into consideration when drawing a conclusion; and
- (d) the content of a possible declaratory order that the court may make.

If you are of the opinion that you need additional facts in order to answer the question effectively, please indicate what facts you would require and how these facts would affect your answer.

South Africa have adopted the UNCITRAL Modal Law in November 2003, however this is not in force currently as they have not designed the reciprocal jurisdictions, therefore this would not be able to used or referred to in terms of recognition. Equally South Africa is not party to any treaty regarding the reciprocal enforcement of foreign judgments.

The High Court in South Africa deals (primarily) with insolvency issued so this matter would be heard by the High Court.

The South African Court will recognise the office holder and not the proceedings in general cases, therefore it should be considered if this would be desirable for Mrs B in her course of action.

Typically, the enforcement or recognition of foreign judgments is governed by Common Law.

In order to a course of action to be enforced in South Africa from a foreign Court, the following will need to be met:

- (a) the foreign court must have had international competence as determined by South Africa Law*
- (b) the judgment must 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*

Commented [INS 19]: 10

Could have included discussion on factors that court will take into consideration.

- (d) The judgment must not have been obtained fraudulently*
- (e) The judgment must not involve the enforcement of penal or revenue law of the foreign state*
- (f) Enforcement must not be prohibited by the Protection of Business Act 99 of 1978*

The South African court will also take into consideration the principles of comity that exist between the states and whether it is just and equitable to recognise a judgment.

South Africa favours the approach of concurrent proceedings, so they may be more inclined, should there be an insolvency of the South African entity, to appoint Mrs B as far as this does not conflict with South African policy or law. However it will be determined the solvency of Money Problems SA, if there was potential for a business rescue to take place this would be the preference of the South African Court in order to protect the interests of the creditors as a whole.

The South African Court would have to grant *rule nisi* and the proposed recognition/proceeding would be advertised for creditors to object, therefore the recognition may be challenged by creditors and they may wish to have a South African office holder in relation to the liquidation of the South African subsidiary.

Office holder Vs Foreign Proceedings

Typically in South Africa the foreign officeholder is recognised in South Africa but not the insolvency proceedings. This will need to be considered for Mrs B in terms of how this may or may not assist her and this will be dependant on many factors, some of those being the assets which are believed to be in South Africa, whether they are movable or immovable and how many South African creditors there are of both entities. In general terms, South African assets should be used to pay South African creditors in the first instance, so it might be that the costs of recognition, litigation and sale of assets in South Africa will not directly benefit the estate of Money Problems NZ and therefore it may not be the best course of action for Mrs B.

The content of a possible declaratory order that the court may make

Amongst other things the declaratory order (which will detail the foreign officeholder's entitlement subject to local requirements) will define the rights of the office holder in terms of:

- ***Meeting of creditors***
- ***Proof, admission and rejection of claims***
- ***Sale of assets***
- ***Plans of distribution of proceeds; and***
- ***The rights and duties of the liquidator***

Powers of office holder

Powers are not necessarily granted in line with what a South African office holder would be granted so Mrs B will need to consider what powers she wishes to be granted and how this might affect her ability to perform her duties.

*** End of Assessment ***