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## PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023

Formative Assessment (Practice Examination)

Date: 26 - 27 October 2023

**Time limit: 24 hours (from 13:00 on 26 October to 13:00 on 27 October 2023)**

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### EXAMINERS

Dr E Levenstein Professor A Loubser Mr T Jordaan Ms R Webster Mr B Duma  
Mr D van der Merwe Ms N Harduth Mr C Rey Ms L Kahn Mr J Evans Ms J de Hutton  
Ms N Mabaso Mr P van den Steen Ms A Cohen Mr D Lake Ms J Mitchell-Marais  
Ms A Timme Mr S Smyth Mr G Rudolph Ms R Thomson Mr C Strime

### MODERATORS

Ms R Bekker Ms B Bennett Dr D Burdette Mr Z Cassim

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It is imperative that all candidates read and take cognisance of the examination instructions on the next page.

All candidates are expected to comply with ALL the instructions.

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### MODEL ANSWERS

## INSTRUCTIONS

1. This assessment paper will be made available at **13:00 (1 pm) SAST on Thursday 26 October 2023** and must be returned / submitted by **13:00 (1 pm) SAST on Friday 27 October 2023**. Please note that assessments returned late will not be accepted.
2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Avenir Next font (if the Avenir Next font is not available on your PC, please select the 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 not be accepted.
3. No limit has been set for the length of your answers to the questions. 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). Candidates who include very long answers in the hope it will cover the answer the examiners are looking for, will be appropriately penalised.
4. You must save this document using the following format: **studentID.Paper1Formative**. An example would be something along the following lines: 202223-336.FormativAssessment. **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.
5. The assessment can be downloaded from your student portal on the INSOL International website. The assessment must likewise be returned via your student portal as per the instructions in the Course Handbook for this course. **If for any reason candidates are unable to access their student portal, the answer script must be returned by e-mail to david.burdette@insol.org.**
6. Due to the high incidence of load shedding currently taking place across South Africa, candidates are required to determine whether any load shedding is scheduled during the examination period and, if so, to make alternative arrangements to write elsewhere if at all possible.
7. Enquiries during the time that the assessment is written must be directed to David Burdette at david.burdette@insol.org or by WhatsApp on +44 7545 773890 or to Brenda Bennett at brenda.bennett@insol.org or by WhatsApp on +27 66 228 2010. Please note that enquiries will only be responded to during UK office hours (which are 9 am to 5 pm BST, or 11 am to 7 pm SAST).
8. While the assessments are open-book assessments, it is important to note that candidates **may not receive any assistance from any person** during the 24 hours that the assessment is written. **Answers must be written in the candidate’s own words; answers that are copied and pasted from the text of the course notes (or any other**

source) will be treated as plagiarism and persons who make themselves guilty of this will forfeit the assessment and disciplinary charges will follow. When submitting their answers, candidates will be asked to confirm that the work is their own, that they have worked independently and that all external sources used have been properly cited. If you submit your assessment by e-mail, a statement to this effect should be included in the e-mail.

9. Once a candidate's assessment has been uploaded to their student portal (in line with the instructions in the Course Handbook), a confirmatory e-mail will be auto-generated confirming that the assessment has been uploaded. If the confirmatory e-mail is not received within five minutes after uploading the assessment, candidates are requested to first check their junk / spam folders before e-mailing the Course Leader to inform him that the auto-generated e-mail was not received.
10. The model answer will be provided **after the closing time of submission for the practice examination at 1 pm on Friday 27 October 2023**. Due to the short time frame between the formative and the summative assessments, the formative assessment will not be marked, hence the provisions of the model answers so that candidates may compare their answers in preparation for the summative assessment (examination).
11. **You are required to answer this paper by typing the answers directly into the spaces provided** (indicated by text that states [Type your answer here]). For multiple-choice questions, please highlight your answer in yellow, as per the instructions included under the first question.
12. Since you have 24 hours within which to answer the assessment, it is suggested that you take the time to read through the assessment in its entirety before attempting to answer the questions.

## ANSWER ALL THE QUESTIONS

### QUESTION 1

Questions 1.1 – 1.20 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. Each of the 20 questions count 1 mark.

#### Question 1.1

Choose the **correct** statement:

Which of the following statements correctly describes the objective of business rescue?

- (a) The development, by a business rescue practitioner, and implementation, if approved, of a business rescue plan to rescue the company by restructuring the affairs of the company.
- (b) The development of a business rescue plan by the directors of the company which, once implemented, will return the company to profitability.
- (c) The development, by a business rescue practitioner, and implementation, if approved, of a business rescue plan that results in a better return for creditors than the immediate liquidation of the company.
- (d) Both (a) and (c) are correct.

#### Question 1.2

Choose the **correct** statement:

A company may be placed in voluntary business rescue by filing –

- (a) A special resolution by the company's shareholders.
- (b) A resolution by the company's board of directors.
- (c) A resolution by a majority of the company's independent creditors.
- (d) An ordinary resolution by the company's shareholders.

### Question 1.3

Choose the **correct** statement:

The moratorium is a defence *in personam* because:

- (a) It is a personal but temporary benefit that is only available to the company in business rescue, its business rescue practitioner and creditors.
- (b) It is a personal but temporary benefit available to the company in business rescue and all affected persons as defined in the Companies Act of 2008.
- (c) It is a personal but temporary benefit available to the company in business rescue with the result that a creditor of the company in business rescue has legal standing to rely on non-compliance with s 133 as a defence.
- (d) It is a temporary personal defence and benefit available to the company in business rescue, with the result that the business rescue practitioner of the company in question may invoke the moratorium in the event of non-compliance with section 133 of the Companies Act of 2008.
- (e) It is a personal defence and benefit available indefinitely to the company in business rescue, with the result that the business rescue practitioner of the company concerned may invoke the moratorium to permanently defeat the claims of creditors in order to improve the prospects of rescuing the company in financial distress.

### Question 1.4

Choose the **correct** statement:

Section 134 of the Companies Act 2008 regulates situations where a company in business rescue may dispose of its property.

- (a) As the business rescue practitioner has full management control of the company during business rescue, he is entitled to make all decisions regarding the disposal of assets on his own.
- (b) A board of directors is not absolved of its duties, powers and obligations during business rescue and continues to represent the company. As such the board can dispose of property on behalf of the company in business rescue, as long as such disposal meets the requirements of section 134 of the Companies Act 2008.
- (c) The business rescue practitioner and the board of directors have to act jointly when disposing of assets in terms of section 134 of the Companies Act 2008.

- (d) Both statements (b) and (c) are correct.
- (e) None of the above statements are correct.

### Question 1.5

Choose the **correct** statement:

A company is leasing property from which it is conducting its business. The company is placed in business rescue, which is an event of breach and the landlord threatens to terminate the lease. The company's business rescue practitioner, who is of the view that the property is of strategic importance, agrees with the landlord to terminate the lease and to conclude a new lease. The landlord has a claim for arrear rentals that were incurred while the Company was in business rescue.

The Landlord's claim under the new lease ought to be classified as:

- (a) Business rescue costs.
- (b) Post-commencement finance.
- (c) Preferent claim in business rescue.
- (d) Secured claim.
- (e) Unsecured claim.
- (f) Damages claim.

### Question 1.6

Choose the **correct** statement:

During business rescue proceedings an employee of the company enjoys various contractual and statutory rights. Many large companies utilise the services of labour brokers in order to manage the varying employee needs of the company, which are often project specific. When considering the rights of employees during business rescue proceedings, do employees employed through a labour broker, or temporary employment service, enjoy the same rights and protections as employees employed directly by the company?

- (a) No, these employees are strictly those of the labour broker for the period of their employment and accordingly the labour broker has the relevant contractual and statutory obligations to such employees for the entire period of their employment.

- (b) No, these employees are strictly those of the labour broker and accordingly the labour broker has the relevant contractual, but not statutory obligations to employees, for the entire period of their employment.
- (c) Yes, the employees of the labour broker are also employees of the company that has engaged the services of the labour broker, from the date of employment to the termination thereof.
- (d) Yes, the employees of the labour broker are also employees of the company that has engaged the services of the labour broker, however the employees of the labour broker are only deemed to be an employee of the company, after a period of three months.

### Question 1.7

Choose the **correct** statement:

Section 128 of the of the Companies Act 2008 defines an “affected person” as:

- (a) A shareholder or creditor of the company, registered trade union representing the employees of the company; and employees of the company that are not represented by trade unions.
- (b) Directors of the company, shareholder or creditor of the company and employees of the company.
- (c) Shareholders or creditors of the company, suppliers of the company; and employees of the company that are not represented by trade unions.
- (d) None of the above.

### Question 1.8

Choose the **correct** statement:

You were certified by CIPC for the first-time last year to practice as a junior business rescue practitioner after you completed the INSOL SARIPA Programme in South African Business Rescue. Since then, you have accepted appointment as the business rescue practitioner of one company in business rescue and are busy implementing the business rescue plan that was adopted by creditors in that matter. You have been approached by your sister to accept appoint as the business rescue practitioner of a large company that she is a director of. You accept the appointment. Which of the grounds for removal of a business rescue practitioner would constitute a sound basis for your removal?

- (i) You did not and do not meet the requirements of section 138 of the Companies Act 2008 when appointed.

- (ii) You are not independent.
- (iii) You are incompetent.
- (iv) You have failed to perform the duties of a practitioner.
- (v) You have engaged in illegal conduct.
- (vi) You have a conflict of interest.
- (vii) You are incapacitated.

(a) (i)

(b) (ii)

(c) (i) and (ii)

(d) (vi)

(e) (i), (ii) and (vi)

### Question 1.9

Choose the **correct** statement:

All creditors must be joined in all legal proceedings involving a company in business rescue where:

- (a) The creditors have a direct and substantial interest in the subject matter of the litigation.
- (b) A business rescue plan has been adopted by the creditors.
- (c) An application is brought to set aside a published business rescue plan that has not yet been adopted by creditors.
- (d) All of the above.

### Question 1.10

Choose the **correct** statement:

A legitimate creditor becomes known for the first time after the adoption of the business rescue plan. They claim they have not received notice and, of course, they did not vote in a section 151 meeting. How do you propose dealing with this situation?

- (a) They fall outside the ambit of the adopted business rescue plan and are thus not bound by it. Their claim needs to be verified and they need to be paid based on a separate arrangement with the creditor exclusively. The claim of not having received notice places a risk on the validity of the business rescue proceedings.



- (b) They fall outside the ambit of the adopted business rescue plan, have foregone their opportunity to be recognised as a creditor and therefore have no claim nor any standing. The fact that they claim that they have not received notice is irrelevant.
- (c) The business rescue practitioner asks them to cast a vote late and re-calculates the outcome of the section 151 meeting. Then notifies the affected persons of the revised outcome.
- (d) The creditor is recognised and bound by the adopted plan regardless of whether they were present and voting at the section 151 meeting. Substantial notices were issued across the various methods as prescribed by the regulations.
- (e) The business rescue practitioner rejects the claim on the basis that it is late and excludes the creditor from the distribution list.

### Question 1.11

Choose the **correct** statement:

A distressed company is placed into business rescue by its board of directors. The company has two shareholders, being Shareholder A and Shareholder B, who hold 60% and 40% of the issued shares respectively. Included in the shareholders' agreement are minority shareholder rights, most notably, anti-dilution rights. The appointed business rescue practitioner intends to publish a business rescue plan that includes running a rights issue to raise new funding. Shareholder A is prepared to take up R100m in new shares as part of the proposed rights issue, which should resolve the company's financial issues, but Shareholder B does not have the funding to be able to follow their rights in terms of the rights issue (it would not be able to subscribe for any new shares). In short, if the rights issue is run and Shareholder A subscribes for new shares, but Shareholder B does not, then Shareholder B will be diluted to a near 0% shareholding. Shareholder A will vote in favour of the intended plan, but Shareholder B will not. How should the business rescue practitioner go about getting the intended business rescue plan approved, given the minority shareholder rights in the shareholders' agreement?

- (a) The business rescue practitioner only requires 50% of the shareholders to vote in favour of the plan to amend shareholder rights and given that Shareholder A already has 60% of the shares, it could pass the vote on its own.
- (b) In terms of section 136 (2), the business rescue practitioner has the right to "...entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue proceedings...", and hence, the business rescue practitioner can suspend the minority shareholder rights in the shareholders' agreement.

(c) The business rescue practitioner can only proceed with the proposed rights issue if the company already has sufficient authorised but un-issued shares.

(d) All of the above.

(e) The business rescue practitioner does not have the right to proceed due to the minority shareholder rights contained in the shareholders' agreement.

### Question 1.12

Choose the **correct** statement:

Financial projections are, per section 150(2) of the Act, required to be incorporated into the published business rescue plan. The projections presented in the business rescue plan must include:

(a) Material assumptions on which the projections have been based as contained within the published business rescue plan and as if it has been adopted.

(b) The expected forecast trading and financial position of the company were the plan not to succeed and the business were to continue trading "as is".

(c) An alternative plan to that presented in the rescue plan.

(d) All of the above.

(e) None of the above.

### Question 1.13

Choose the **correct** statement:

How important is it for business rescue practitioners to keep Boards and Directors onside and included?

(a) Critical to keep them at all costs.

(b) Really valuable to keep them.

(c) Important if possible to maintain, assist with knowledge, bandwidth and continuity.

(d) Best to divide into those who agree with business rescue practitioner *versus* not (and side-line / remove) those who don't agree.

(e) Doesn't matter at all as the business rescue practitioner has **all** the power.

### Question 1.14

Choose the **correct** statement:

A business rescue plan will be approved on a preliminary basis if:

- (a) There are no creditors and the shareholders vote in favour of its adoption.
- (b) It is supported by more than 51% of all the creditors and approved by the shareholders of the company.
- (c) It is supported by more than 75% of all the creditors who voted, and at least 50% of the independent creditors' voting interests.
- (d) The plan alters the rights of shareholders of any class, but the majority of the affected shareholders nevertheless support the adoption of the plan.
- (e) Only (c) and (d) are correct.

### Question 1.15

Choose the **correct** statement:

Which of the following statements is true about the "fresh start" principle in South African Insolvency law?

- (a) It applies only to individual consumer debtors and not to companies.
- (b) It applies only to companies and not to individual consumer debtors.
- (c) It applies to both individual consumer debtors and companies, under the Insolvency Act of 1936, and the Companies Act of 2008, respectively.
- (d) It does not apply to either individual consumer debtors or companies.

### Question 1.16

Choose the **correct** statement:

Which of the following might be a reason to choose liquidation over business rescue where there is reason to suspect financial mismanagement by the pre-existing board?

- (a) In business rescue, creditors will be notified of the company's financial distress, whereas a liquidation application does not require notice to creditors.

- (b) A liquidator has certain investigative powers that a business rescue practitioner does not have.
- (c) Liquidations are quicker and more cost effective than business rescue.
- (d) In a liquidation context, it is possible to prevent dispositions made by the company outside of the ordinary course of business.
- (e) The threshold / degree of financial distress is lower in the case of liquidation, and therefore the board would be able to be displaced more easily if it were placed into liquidation than if it were placed under business rescue.

### Question 1.17

Choose the **correct** statement:

According to *Van Staden v Angel Ozone Products (in liquidation)* CC 2013 (4) SA 630 (GNP), when is it possible to convert liquidation proceedings to business rescue proceedings?

- (a) At any time.
- (b) At any time between the *concursum* of creditors and the interim liquidation order is granted.
- (c) At any time before the final order of liquidation has been granted.
- (d) At any time before the liquidator has prepared the final liquidation and distribution account.
- (e) Never - it is only possible to convert a business rescue into liquidation.

### Question 1.18

Choose the **incorrect** statement:

Business rescue proceedings end -

- (a) when the business rescue plan has been rejected by creditors and nothing further is done.
- (b) when the business rescue practitioner files a notice of substantial implementation of the rescue plan.

(c) when no business rescue plan is published within the prescribed period or extended period.

(d) when the practitioner files a notice that a company in voluntary business rescue is no longer financially distressed.

### Question 1.19

Which of the following rights **is not** afforded to creditors?:

(a) the right to participate in court proceedings;

(b) the right to be given notice of all court proceedings;

(c) the right to be given notice of all creditors' meetings;

(d) the right to be represented on the creditors' committee where creditors decide that such a committee is necessary.

### Question 1.20

Choose the **correct** statement:

A company is placed in business rescue. Its employees have not been paid for several months before business rescue commenced. Those employees' claims ought to be classified as:

(a) Business rescue cost.

(b) Post-commencement finance.

(c) Preferent claim in business rescue.

(d) Secured claim.

(e) Unsecured claim.

(f) Damages claim.

Where appropriate, refer to the case study below when answering the questions that follow.

### CASE STUDY

#### MEROPA RETAIL GROUP LIMITED

Meropa Retail Group Limited (**Meropa Retail**) is a public company duly incorporated and registered as such under the applicable company laws of the Republic of South Africa. Meropa Retail has been operating as a clothing, footwear and homeware retailing company in South Africa for more than 80 years and has - up until the year 2022 - enjoyed significant market share as one of the country's largest and most profitable non-food retailers. Meropa Retail serves customers across South Africa through over 700 department stores located in leading shopping malls throughout the country. All Meropa Retail's stores are situated on premises that are leased (on a long-term basis) by Meropa Retail in terms of various commercial lease agreements entered into with landlords. It is well known that Meropa Retail is the "anchor tenant" of a number of shopping malls and has what may be referred to as an "over-supply" of leased floorspace, given the advent of online shopping and consumers' increasing preference to purchase products online.

Over the past years, Meropa Retail has firmly established itself as the "go-to" retail group, comprising several well-known divisions that house local and international brands, and which cater for the clothing, footwear and homeware needs of both upper and lower-income consumers. In addition, Meropa Retail has steadily become a leading "homegrown" employer, with a large staff complement of approximately 18,000 employees across its various divisions and stores countrywide. The majority of Meropa Retail's employees are represented by United Retail Workers Union (**URWU**), a South African registered trade union that aims to advance the interests of employees engaged in the retail sector.

From about 1 March 2021 (being the start of the 2021 financial year), it became apparent that Meropa Retail had experienced a sharp decline in its operating revenue during the 2020 financial year, which was due to the following factors: (i) increased competition from up-and-coming South African clothing and homeware retailers, (ii) an increased supply of cheaper imported clothing sold on digital platforms accessible to South African consumers, (iii) the advent of online shopping, which Meropa Retail battled to keep up with, (iv) a weakening Rand that led to increases in Meropa Retail's operating costs and overheads, and (iv) a stalling South African economy which resulted in South African consumers tightening their belts.

As a result of the lacklustre financial performance of Meropa Retail in the 2020 financial year, Meropa Retail embarked on a group-wide debt restructure and refinancing in order to (i) preserve its current business operations, (ii) retain its employees, and (iii) return to profitability. This group-wide restructure entailed (i) the refinance of approximately R7,000,000,000 of existing debt acquired from The Extraordinary Bank of South Africa (for which Meropa Retail ceded its book debts and bank accounts as security - over and above the existing security package), (ii) the acquisition of an additional R5,000,000,000 in debt financing from Real Dollar Bank, secured by, amongst others, a special notarial bond and a general notarial bond registered in favour of Real Dollar Bank, (iii) the issuance of preference shares and other equity instruments by Meropa Retail to Orlando Investments Proprietary Limited (**Orlando Investments**), pursuant to which an additional R2,500,000,000 was raised, and (iv) a capital injection of R500,000,000 by way of unsecured shareholder loans advanced by Meropa Retail's three shareholders namely, (i) Meropa Holdings Limited, which holds 60% of the issued ordinary shares in the share capital of Meropa Retail, (ii) Orlando Investments, which holds 35% of the issued ordinary shares in the share capital of Meropa Retail, and (iii) Management HoldCo Proprietary Limited, which holds 5% of the issued ordinary shares in the share capital of Meropa Retail.

By virtue of the recapitalisation of Meropa Retail and the significant increase in liquidity resulting from the restructure, the board of directors of Meropa Retail, which comprises three executive directors, namely (i) Mr Tim Savannah (the Chief Executive Officer), (ii) Ms Kwena Seroka (the Chief Financial Officer), and (iii) Mrs Georgia Smith (the Chief Operations Officer), and two non-executive directors, namely (i) Mr Bryan Khumalo, and (ii) Ms Caroline Abrahams, resolved to aggressively expand Meropa Retail's business operations by venturing into neighbouring markets, namely Botswana, Namibia, Lesotho and Eswatini. Pursuant to this expansion, Meropa Retail (i) increased its workforce by hiring an additional 800 employees to cater for the anticipated increase in demand, (ii) acquired a brand-new fleet of delivery vehicles under instalment sale agreements (with appropriate reservation of ownership clauses) concluded on market standard terms with Wonderworld Autos Proprietary Limited (**Wonderworld Autos**), and (iii) entered into new commercial lease agreements with Real Landlords Limited (**Real Landlords**) for additional warehouses and storage facilities to accommodate the additional inventory destined for Meropa Retail's new Southern African locations.

For most of the 2021 financial year, the expansion of Meropa Retail's business began paying dividends, and the 2021 audited financial statements of Meropa Retail reflected slight increases in revenue. However, from the beginning of the 2022 financial year, factors such as (i) the global recession predicated by international conflicts, (ii) the struggling South African economy, and (iii) loadshedding, resulted in a negative outlook for Meropa Retail, as Meropa Retail's management accounts reflected (i) an increase in overheads, and (ii) liquidity shortages due to Meropa Retail not reaching its projected sales targets, and being unable to collect sufficient amounts from its debtor's book. The lack of liquidity resulted in Meropa Retail experiencing significant difficulties in servicing its debt obligations, and paying its employees' salaries, on a month-to-month basis.

In light of the fact that it was becoming more and more likely that Meropa Retail would become unable to pay its debts as and when they became due and payable, the writing was on the wall, and Ms Kwena Seroka and Ms Caroline Abrahams became increasingly concerned about their duties and obligations as directors given that it appeared that Meropa Retail was “financially distressed”. Kwena and Caroline immediately began to explore the options available to Meropa Retail. Interestingly enough, the other directors of Meropa Retail were of the view that Meropa Retail was not “financially distressed” as its total assets exceeded its total liabilities.

Due to the reluctance of the remaining members of the board to take action, no further steps were taken by Kwena and Caroline, who both subsequently resigned from the board of directors of Meropa Retail. Accordingly, Meropa Retail continued to trade in the ordinary course for a few months, albeit in “financially distressed” circumstances. However, soon enough the company experienced a liquidity crisis where it was unable to pay its critical suppliers, its landlords and its employees’ salaries.

As a result of Meropa Retail’s failure to pay its debts, certain creditors began taking steps to recover the amounts owing to them, and in this regard: (i) Johannesburg Central Security Services Proprietary Limited issued summons against Meropa Retail, in terms of which it claimed the amounts outstanding under the service agreement it had concluded with Meropa Retail, (ii) Urban Shopfitters CC, had begun preparing a liquidation application, on the basis that Meropa Retail ought to be deemed to be unable to pay its debts, and (iii) the South African Revenue Services delivered letters of demand to Meropa Retail, demanding payment of unpaid income tax in terms of its 2019, 2020 and 2021 tax assessments.

Given that salaries remained unpaid, URWU in conjunction with the employees’ of Meropa Retail, immediately obtained legal advice from insolvency and restructuring law experts on the options available to them. In the advice, the employees of Meropa Retail were informed of the benefits of business rescue proceedings under the Companies Act 2008 (**Companies Act 2008**) and the advantageous position it puts them in (as employees), as compared to a liquidation scenario. On this basis, the employees and URWU agreed to commence business proceedings (at their instance) and launched a High Court application in their capacities as “affected persons” for the business rescue of Meropa Retail.

In the interim, Mr Tim Savannah, on hearing that a business rescue application had been launched by URWU, obtained legal advice of his own and which advice subsequently prompted the board of directors of Meropa Retail to pass a board resolution to place Meropa Retail under business rescue proceedings on the basis that, amongst other things, there was a “reasonable prospect of rescuing the company”. Mr Tim Savannah was inclined to place the company in business rescue after being advised of the statutory moratorium on claims, and due to the strategic advantage that it would give the board in relation to the appointment of a business rescue practitioner.



The board resolution to commence voluntary business rescue was filed with the Companies and Intellectual Property Commission and Mr Ethan Dunce (being a senior business rescue practitioner) was appointed as the business rescue practitioner of Meropa Retail by the board. Mr Dunce was the clear “frontrunner” for the role of business rescue practitioner, despite being disqualified from acting as a director of a company in terms of the Companies Act 2008, given that he was Mrs Georgia Smith’s brother. It eventually came to light that Mr Dunce’s appointment as business rescue practitioner was inappropriate and he was subsequently removed as the business rescue practitioner of Meropa Retail, pursuant to a complex court application brought by one of Meropa Retail’s creditors.

Notwithstanding the assertion by the employees of Meropa Retail that they had the right to appoint Mr Dunce’s replacement, the board of Meropa Retail appointed Mr Themba Nkosi (an experienced business rescue practitioner) as the replacement business rescue practitioner. Mr Nkosi immediately assumed full management control of Meropa Retail. After the first meeting of creditors, Mr Nkosi thoroughly investigated the affairs of Meropa Retail and consulted with various affected persons in the development of a business rescue plan.

In relation to the various contracts concluded by Meropa Retail with its various suppliers, landlords, and employees, Mr Nkosi took a very robust approach and, in respect of:

- (i) the instalment sale agreements with Wonderworld Autos, opted to cancel the relevant instalment sale agreements whilst retaining possession of the delivery vehicles that formed the subject of those agreements, and was of the view that such vehicles could not be recovered by Wonderworld Autos as a result of the protections afforded by the moratorium against legal proceedings;
- (ii) the commercial lease agreements with Real Landlords, refused to vacate the relevant warehouses and storage facilities due to their significance to the ongoing operation of Meropa Retail’s business, notwithstanding the fact that Real Landlords had validly cancelled the lease agreements, as Meropa Retail had fallen into arrears of its rental payment obligations;
- (iii) the various prejudicial and onerous contracts that he had identified, proceeded to entirely or partially suspend the obligations of Meropa Retail thereunder; and
- (iv) the additional 800 employees that were hired by Meropa Retail post the restructure, unilaterally amended and varied their employment terms and conditions, by reducing their salaries and benefits. In addition, Mr Nkosi began considering the retrenchment of Meropa Retail’s remaining workforce.

Mr Nkosi also conducted thorough investigations into the affairs of Meropa Retail, during which investigations it was discovered that:

- (i) the office furniture, manufacturing equipment and inventory (worth approximately R20,000,000) that Themba wished to dispose of as part of the business rescue process (and not in the ordinary course of the company's business), was subject to security held by Real Dollar Bank, for loans advanced by Real Dollar Bank to Meropa Retail in an aggregate amount equal to R50,000,000; and
- (ii) notwithstanding the clear instructions given by Mr Nkosi to Mr Bryan Khumalo in relation to the day-to-day management of the company and the exercise of his functions as a director, Mr Khumalo was on a "mission of his own" and consistently took decisions on behalf of Meropa Retail without the approval of Mr Nkosi. In addition, Mr Khumalo refused to co-operate with Mr Nkosi and was reluctant to provide any information and records relating to the affairs of the company to Mr Nkosi and his team. Eventually, Mr Khumalo began to conduct himself in manner which could be described as "obstructive" to the business rescue process and the performance of Mr Nkosi's powers and functions.

Following his investigations into the business and affairs of Meropa Retail, Mr Nkosi was of the firm view that Meropa Retail was capable of being rescued, and he immediately set out to find ways to secure additional financing to keep the company afloat. Given that Meropa Retail had existing facilities with The Extraordinary Bank of South Africa, Themba approached its lead transactor Mr Maxwell Baggs, in an attempt to acquire post-commencement finance. Mr Baggs was unsure about the status of Meropa Retail's existing facilities, and wondered whether the new facilities sought by Mr Nkosi would be treated differently in the business rescue context. In response to Mr Baggs' concerns, Mr Nkosi immediately responded by sharing a brief note with the Extraordinary Bank team setting out (i) the purpose and importance of post-commencement finance, (ii) the different types of post-commencement finance, and (iii) the order in which the claims of creditors rank during business rescue. The note shared by Mr Nkosi gave the credit committee of The Extraordinary Bank the necessary comfort and consequently post-commencement finance facilities, in an aggregate amount equal to R4,000,000,000, were made available to Meropa Retail. Mr Nkosi was delighted by this incredible feat and unilaterally decided to pay himself a "success fee" of R2,000,000, on the basis that had he not secured the relevant post-commencement finance, Meropa Retail would have been placed into liquidation. The success fee was deposited via EFT directly into Themba's bank account, and no mention of it was made in the business rescue plan of Meropa Retail.

The business rescue plan of Meropa Retail was eventually published 180 days after Themba was appointed as the business rescue practitioner. The business rescue plan was then put to a vote at a meeting of creditors held in terms of section 151 of the Companies Act 2008. The business rescue plan of Meropa Retail was supported by the holders of 80% of the creditors voting interests and, given that the business rescue plan altered the rights of Meropa Retail's existing shareholders, an additional step was required in terms of the provisions of the Companies Act 2008. Following this additional step, the business rescue plan was finally adopted and Themba began implementing the plan.

Meropa Retail exited from business rescue six (6) months later, when Mr Nkosi filed a notice of substantial implementation of the business rescue plan.

## Question 2

Was the board resolution to commence business rescue proceedings valid, even though Urban Shopfitters CC had already begun preparing a liquidation application? Substantiate your answer with reference to the provisions of the Companies Act 2008 and all relevant case law. (10)

Answer:

In terms of section 129(2)(a) of the Companies Act 2008, a board resolution to commence business rescue may not be adopted if liquidation proceedings have already been "initiated" by or against the company.

There is no definition in the Act for the word "initiated". This has resulted in conflicting judgments by the courts. In *FirstRand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd* the court held that it must be assumed to mean the same as "commence". This is defined in the Companies Act 1973 as being the moment of issuing of the application by the Registrar of the court because any other meaning would cause unnecessary uncertainty.

However, in *Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and Others*, it was held that a liquidation application must be served on the company, and not merely issued and filed at court to be regarded as having been initiated since the issuing of an application, without the company being aware of its existence (that is, without service of the application) cannot be said to be proceedings "initiated" against the company.

In *Mouton v Park 2000 Development 11 (Pty) Ltd and Others* the court disagreed with this interpretation and held that the word "initiated" in section 129(2)(a) is intended to refer to a preceding act or conduct by which liquidation proceedings are set in motion and what that act or conduct may be will depend on the facts of each matter. The court held that in most instances, it will be the adoption of the necessary resolution by the creditor to launch such liquidation proceedings.

In *Pan African Shopfitters (Pty) Limited v Edcon Limited and Others*, the court agreed with the conclusion in the *Tjeka Training Matters* that liquidation proceedings contemplated in section 129(2)(a) of the Companies Act 2008 are initiated once a liquidation application is issued and served on the company.

Although there has not as yet been a judgment by the Supreme Court of Appeal on the correct meaning of "initiated" in this context, it seems quite likely that when the question comes before the SCA, the court will agree with this interpretation based on the view it adopted in the judgment of *Lutchman NO v African Global Holdings (Pty) Ltd* albeit in a different context and dealing with a different section.

According to the facts provided, the application for liquidation had not yet been issued or served on the company. The board resolution would then be valid unless the view of the court in the *Mouton* case is accepted as correct. In such a case the preparation of a liquidation application by Urban Shopfitter would be regarded as initiation of liquidation proceedings and the board resolution would have been invalid.

### Question 3

With reference to the relevant legislative provisions and case law, advise Mr Nkosi on the effect, if any, of the commencement of business rescue proceedings in respect of Meropa Retail on the following steps taken by its creditors to recover monies owing to them:

- 3.1 The summons instituted by Johannesburg Central Security Service (Pty) Ltd against Meropa Retail for payment of amounts owing under the service agreement it had concluded with Meropa Retail. **(6)**

Answer:

- The summons instituted by Johannesburg Central Security Service (Pty) Ltd against Meropa Retail for payment of amounts owing under the service agreement it had concluded with Meropa Retail is stayed or suspended by the moratorium created by virtue of Meropa Retail being placed in business rescue, for the reasons set out below.
- Section 133(1) of the Companies Act of 2008 ("the Companies Act"), provides that no legal proceedings, including enforcement action may be commenced or proceeded with against the company or in relation to any property belonging to the company, or lawfully in its possession, unless the written consent of the business rescue practitioner has been obtained or with the leave of the court. **(1)**
- Although chapter 6 of the Companies Act 2008 does not define the terms "legal proceedings" or "enforcement action", their respective meaning has been dealt with by the courts. In this regard:- **(1)**
  - in *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC* 2013 (6) SA 540 (WCC), the court held that the intention of s133 is clear in that it is to cast the net as

wide as possible in order to include any conceivable type of action against the company such as liquidation proceedings; **(1)**

- in *Merchant West Working Capital Solutions (Pty) Ltd v Advanced Technologies and Engineering Company Ltd* 13/12406, 10 May 2013 GSJ, the court held that the term “legal proceedings” in the context of section 133 should be given its ordinary meaning. Legal proceedings would therefore include any matter to be referred to court, tribunal or any other formal proceedings which are intended to adjudicate a matter; **(1)**
- in *Cloete Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank*, the SCA considered the meaning of “enforcement action” and held inter alia that the words “enforce” and “enforcement” usually refer to enforcement of obligations. The SCA was thus of the view that “enforcement action” was therefore a species of legal proceeding. The court held that this conclusion was strengthened by the fact that section 133(1) provides that “no legal proceeding, including enforcement action, ... may be commenced or proceeded with in any forum”; **(1)**
- it is therefore clear that the summons instituted by Johannesburg Central Security Service against Meropa Retail is a legal proceeding and/or enforcement action as contemplated in section 133(1), the prosecution of which is suspended or stayed by the moratorium because:-
  - it is an action against the company as contemplated in *Blue Star*;
  - it is a matter to be referred to a court as stated in *Merchant West*;
  - it constitutes an enforcement of Meropa’s obligations in terms of the service agreement as contemplated in *Cloete Murray*. **(1)**

3.2 The letters of demand by the South African Revenue Service to Meropa Retail, demanding payment of unpaid tax in terms of the 2019, 2020 and 2021 tax assessments. **(1)**

Answer:

The commencement of business rescue in respect of Meropa Retail and the moratorium created thereby have no legal significance on the letters of demand by SARS to Meropa Retail, demanding payment of unpaid tax in terms of the tax assessments in question. That is because the moratorium does not apply to juristic acts such as the dispatch of a letter of demand. **(1)**

#### **Question 4**

If the directors of Meropa Retail had bound themselves as sureties for Meropa Retail’s debts to Johannesburg Central Security Services arising from the services agreement concluded between Meropa and Johannesburg Central Security Services, would the moratorium created when Meropa was placed in business rescue be available to them as sureties? Substantiate your answer with the relevant authority. **(5)**

Answer:

- The moratorium is a personal defence available to the company in business rescue. It is not available to sureties who have bound themselves as sureties for the debts of the company in business rescue. The authority for this proposition is the case of *Investec v Bruyns*, where the defendant was sued as surety for the debts of two companies in business rescue and raised a defence that the section 133(1) moratorium precludes the plaintiff from enforcing its claim against the defendant as surety. **(1)**
- The court therefore considered section 133(1) and section 133(2) and held that "Section 133(1) is a general provision and affords the company protection against legal action on claims in general except, inter alia, with the written consent of the business rescue practitioner or (presumably failing such consent) with the leave of the court. **(1)**
- Section 133(2) is a special provision dealing specifically with the enforcement of claims against the company based on guarantees and suretyships [by the company] and stipulates that in such cases the claims against the company may be enforced only with the leave of the court. The business rescue practitioner is not empowered to consent to the enforcement against a company of claims based on guarantees and suretyships. **(1)**
- Section 133(2), as a special provision, would apply to the exclusion of section 133(1) insofar as claims based on guarantees and suretyships are concerned". **(1)**
- The court in *Investec v Bruyns* further found that the statutory moratorium created by section 133(1) is a defence in personam (ie it is available to the principal debtor and not the surety) and would not have the effect of extinguishing or discharging the obligations of the principal debtor. The court held further that "If the lawmaker intended to prohibit creditors from enforcing their claims against sureties of companies undergoing business rescue, it would have done so". **(1)**

## Question 5

- 5.1 Do the instalment sale agreements with Wonderworld Autos constitute a "property interest" or a "security interest" in terms of section 134 of the Companies Act 2008? **(1)**

Answer:

Property interest **(1)**

- 5.2 Explain the difference between a "property interest" and a "security interest" and provide an example of each. **(4)**

Answer:

A property interest refers to instances where a party is the owner of an asset that is legally in possession of the company in business rescue. **(1)**

Examples are reservation of ownership, leased assets, or instalments sale agreements. **(1)**

A security interest refers to instances where assets of the company in liquidation are subject to the security of a creditor of the company in business rescue. **(1)**

Examples are a mortgage bond over immovable property, a special notarial bond, cession of debtors (or other rights) and all forms of pledges. **(1)**

### **Question 6**

- 6.1 During business rescue proceedings of Meropa Retail Group, the appointed business rescue practitioner elected to cancel the instalment sale agreements with Wonderworld Autos and to retain possession of the assets that are subject to the instalment sale agreements. Was the business rescue practitioner entitled to unilaterally cancel the instalment sale agreements and would the business be entitled to retain such assets in the circumstances? **(5)**

Answer

In terms of section 136 the Companies Act 2008, a business rescue practitioner has two options when he identifies an onerous contract that the company is currently subject to. The business rescue practitioner can either approach the court to have an onerous contract cancelled or alternatively the business rescue practitioner can elect to entirely, partially or conditionally suspend the obligations of such a contract, for the period of business rescue. **(1)**

In this instance the business rescue practitioner elected to unilaterally cancel the instalment sale agreement, however he did not approach a court of law in order to do so and therefore his unilateral cancellation of the instalment sale agreements will be of no force or effect, as his actions are unlawful. **(1)**

If anything, the business rescue practitioner's unlawful unilateral cancellation of the instalment sale agreement could be regarded as a repudiation of such contract by the counterparty and to the extent that such repudiation is accepted by Wonder World Autos, it may also allow for a cancellation of such agreement by Wonder World Autos. **(1)**

In circumstances where the instalment sale agreement has been validly cancelled by Wonder World Autos prior to the commencement of business rescue or alternatively the right has accrued to cancel the instalment sale agreement prior to the commencement of business rescue, Wonder World Autos would retain the right to cancel such agreement and Meropa Retail Group would not be entitled to retain possession of the assets subject to the instalment sale agreement as the company would not be in legal possession of the assets and therefore the general moratorium would not be applicable. **(1)**

In order for a company to rely on the general moratorium in the Companies Act 2008, it is a requirement that the company is in legal possession of the assets in question. In this instance the instalment sale agreement had the necessary reservation of ownership clauses and therefore ownership did not transfer to the company in rescue and accordingly upon

the cancellation of the agreement the company is no longer in legal possession of such assets and cannot enjoy the benefits of the general moratorium. **(1)**

6.2 The business rescue practitioner of Meropa Retail Group made the unilateral election to vary the terms and conditions of the employment of nearly 800 employees of the company by seeking to reduce the salaries and benefits of such employees. Is the business rescue practitioner entitled to do so by virtue of his appointment as business rescue practitioner? Provide reasons for your answer. **(6)**

The status and rights of employees in a business rescue process are entrenched in chapter 6 of the Companies Act 2008, and the provisions of chapter 6 of the Companies Act 2008 does not supersede the provisions of the Labour Relations Act nor the Basic Conditions of Employment Act. Accordingly, a business rescue practitioner does not have the statutory power to unilaterally amend or cancel any contract of employment or any aspect of a contract of employment, without the express consent of the employees concerned. **(1)**

The unilateral amendment of the salaries and benefits of such employees by the business rescue practitioner would be seen as an unfair labour practice and his attempt to do so is accordingly unlawful. **(1)**

The financial distress of the company would affect employees and in the absence of a collective agreement that allows for a reduction in salaries and benefits of such employees in terms of such collective agreement, the business rescue practitioner would be required to commence with a section 189 consultative process in terms of the Labour Relations Act, if it is perceived that rescue proceedings would have an effect on the rights of employees during a business rescue process. **(1)**

As part and parcel of the section 189 consultative process in terms of the Labour Relations Act, and as an alternative to a proposed retrenchment, the business rescue practitioner could propose a reduction in salaries and benefits of employees in order to assist and alleviate in the cash flow pressures of the business during proceedings. Accordingly, section 189 can be utilised to create consensus and agreement between employees and the company in rescue regarding the altering of the rights and status during proceedings, as an alternative to a potential retrenchment. **(1)**

One must however be cognisant of the Labour Appeal Court decision that requires other business rescue practitioners who envisages the need for a section 189 process in terms of the Labour Relations Act to include this in his proposed business rescue plan prior to the commencement of the section 189 process. **(1)**

Should the business rescue practitioner continue to implement the unilateral amendment of the contractual rights between the company and its employees, the employees would have the right to approach the Labour Court for urgent relief as the business rescue practitioner's actions are unlawful. **(1)**



## Question 7

- 7.1 Discuss the rights held, if any, by Meropa Holdings Limited, Orlando Investments and Management Holdco Proprietary Limited during the business rescue process of Meropa Retail. (5)

Answer:

Meropa Holdings Limited, Orlando Investments and Management Holdco Proprietary Limited are shareholders of Meropa Retail ("the shareholders") and, as such, (together with the employees, trade unions and creditors) fall into the category of "affected persons" as defined by section 128(1)(a) of the Companies Act 2008 ("The Act"). (1)

The shareholders would have had the right to be notified of, participate in, and object to the business rescue proceedings. (1)

The shareholders would also have had the right to bring an application to commence business rescue proceedings. (1)

The shareholders were also entitled to have been give notice of and the right to participate in, court proceedings and meetings that might have been held by Mr Nkosi during the business rescue process. (1)

As Meropa Retail's business rescue plan altered their rights (that is, the rights attached to their shares), they also had the right to vote on the approval or rejection of the business rescue plan. (1)

- 7.2 Could Mr Nkosi have had Mr Khumalo removed as a director of Meropa Retail? (3)

Answer:

A business rescue practitioner is only able to remove a director during business rescue proceedings by means of a court order, if the director has failed to comply with a requirement of Chapter 6 of the Act, (1) or by act or omission has impeded or is impeding the business rescue practitioner in (i) the performance of his powers and functions, or (ii) the management of the company by the practitioner, or (iii) the development or implementation of a business rescue plan. (1) As Mr Khumalo refused to cooperate with Mr Nkosi, was obstructive to the business rescue process and purported to make decisions on behalf of Meropa Retail, Mr Nkosi could have applied to a court for his removal as a director. (1)

## Question 8

- 8.1 Which sections of the Companies Act 2008 will the applicant creditor have relied upon in their court application to remove Mr Duncie as business rescue practitioner of Meropa Retail? Explain why each section applies. (4)

Answer:

Sections 130(1)(b)(ii) and 139(2)(e) read with 2(1)(a)(ii) **(1)** – Mr Dunce is related to one of the directors of Meropa Retail, Mrs Georgia Smith. He is therefore not independent as defined in section 2 of the act as he and one of the directors are not separated by more than two degrees of consanguinity. **(1)**

Sections 130(1)(b)(i) and 139(2)(d) read with 138(1)(d) and (e) and (f) **(1)** – Mr Dunce does not meet the requirements of s 138 of the Companies Act 2008 when appointed as he has been disqualified from acting as a director of a company in terms of the Companies Act 2008. **(1)**

8.2 Were the employees of Meropa Retail correct in their belief that they had a right to appoint a replacement business rescue practitioner following the removal of Mr Dunce by the court? Include reference to relevant case law in your answer. **(3)**

Answer:

The business rescue process was commenced by way of directors' resolution. As such the appointment of the replacement business rescue practitioner is to be made by the directors of Meropa Retail. **(1)** This was confirmed by the judgements issued by the Supreme Court of Appeal and confirmed by the Constitutional Court in *Shiva Uranium (Pty) Limited (in business rescue) and Another v Tayob and Others* [2021]. **(1)**

Conclusion: The employees were not correct in their belief that they had a right to appoint a replacement business rescue practitioner following the removal of Mr Dunce by the courts as the business rescue process did not commence by order of the court as a result of their application to place Meropa Retail into business rescue. **(1)**

8.3 Meropa Retail approaches you for an opinion as to whether it is able to recover the success fee of R2,000,000 paid by the company to Mr Themba Nkosi during the business rescue process. Please provide reasoned argument to support your views. **(3)**

Answer:

For concluding that the company would have grounds to recover the success fee. **(1)**

If the following is mentioned:

- The success fee was not approved by either the creditors or shareholders as is required in terms of section 143(3). **(1)**
- The success fee was not included in the adopted business rescue plan which is another mechanism the business rescue practitioner could have used to secure its approval. **(1)**

### Question 9

9.1 When preparing a Business Rescue Plan, the business rescue practitioner must understand the various creditor claims and, therefore, the associated voting rights attributable to each claim.

Assist the business rescue practitioner in understanding the voting universe by populating the table below as follows:

- (a) Classify each party as either: Secured Creditor, Unsecured Creditor, PCF Creditor, Preferent Creditor, or none of the above;
- (b) Indicate whether each party is independent or non-independent as per section 128(1)(g);
- (c) Indicate whether each party, considering your answers under (a) and (b), has a voting right or not.

**(8)**

(1 mark per row only if **all three answers** in that row are correct)

Party	Classification	Independent / Non-Independent	Voting Right (Yes / No)
Orlando Investments (Preference Shares, which are assumed to be equity in nature)			
The Extraordinary Bank of South Africa (Pre - Commencement)			
The Extraordinary Bank of South Africa (Post - Commencement)			
Wonderworld Autos Proprietary Limited			
Unpaid Employees' Salaries (Pre - Commencement)			
Johannesburg Central Security Services Proprietary Limited			
South African Revenue Service (SARS)			
Shareholder Loan (Orlando Investments)			

Answer:

Party	Classification	Independent / Non-Independent	Voting Right (Yes/No)
Orlando Investments (Preference Shares, which are assumed to be equity in nature)	Not a creditor	Non-Independent	No
The Extraordinary Bank of South Africa (Pre - Commencement)	Secured Creditors	Independent	Yes
The Extraordinary Bank of South Africa (Post - Commencement)	PCF Creditor	Independent	<b>Yes</b> if <i>Wescoal</i> case disregarded <b>No</b> if <i>Wescoal</i> case mentioned
Wonderworld Autos Proprietary Limited	Secured Creditors	Independent	Yes
Unpaid Employees' Salaries (Pre - Commencement)	Preferent Creditor	Independent	Yes
Johannesburg Central Security Services Proprietary Limited	Unsecured Creditors	Independent	Yes
SARS	Unsecured Creditors	Independent	Yes
Shareholder Loan (Orlando Investments)	Unsecured Creditors	Non-Independent	Yes

9.2 If you have indicated above that a party **does not** have a voting right, explain why. **(2)**

Answer:

Orlando Investments (Preference Shares) does not have a voting right because it is not a creditor.

If candidates reference the *Wescoal* case motivating why The Extraordinary Bank of South Africa (PCF claim) does not have a voting right, award a mark. However, candidates not to be penalised they state that the PCF creditor, which is a PCF creditor claim does have a vote.

(In the recent *Wescoal* judgement, the High Court stated that PCF creditors do not get voting rights, and hence, The Extraordinary Bank of South Africa (Post - Commencement),

being a PCF creditor, does not get a voting right. However, the *Wescoal* case is currently under appeal. In the past, PCF creditors have been afforded voting rights.

### Question 10

10.1 In preparing the financial forecasts for inclusion in the section 150 business rescue plan of Meropa Retail (Pty) Limited, Mr Nkosi includes the following:

- An annualised balance sheet for the financial year ending 31 March 2024; and
- Annualised income statements for the financial years ending 31 March 2024, 2025 and 2026.

What advice would you give Mr Nkosi to ensure that his business rescue plan, in terms of section 150(2)(c)(iv), is brought up to best-practice standards (and explain why)? **(4)**

Answer:

- Balance sheet for the ensuing three year period required **(1)**
- Income statement on a monthly basis for the first year and annualised thereafter **(1)**
- Detailed cash flow statement for the three years with the first year monthly and annualised thereafter **(1)**
- The financial projections are the basis upon which the affected persons are able to assess the overall proposal and likely success of the business rescue. The financial projections guides the vote on the plan. The more granularity that is provided, the better, as this assists affected persons in understanding the reasonableness, to a greater degree, of the projections. Cash flow is vital to the success of a business rescue and it demonstrates how the business rescue dividend / distribution will be paid, future lifeblood of the business and highlights any potential liquidity challenges in the forecast period. **(1)**

10.2 Section 150(3) of the Companies Act 2008 requires that a notice of material assumptions must accompany the financial projections in terms of section 150(2)(c)(iv). From the information available, please provide three main assumptions that you believe Mr Nkosi would need to specify in the notice of material assumptions and explain the importance of each. **(6)**

Answer:

(Any three of the below or reasonable assumptions with explanations - each assumption is 1 mark and each valid explanation is 1 mark)

- The exchange rate used in the financial projections
  - The weakening Rand was a cause of distress
- The collection rate from the debtors book and cash conversion cycle
  - Poorer collections led to liquidity shortages pre-rescue therefore it is important to understand whether a higher default rate is built into the forecasts or not.

- Revenue split between the three divisions (clothing / footwear / homeware)
  - These are the three major divisions of the company and understanding how the revenue split comes to prior years and reasons for any changes / deviations will be important.
- Number of employees
  - Due to the fact that Mr Nkosi is seeking to reduce the workforce, it will be important to understand:
    - the number of workers included in the financial forecasts; and
    - The quantum and timing of the monies paid to employees as retrenchment.
- Inflation rate over the forecast period
  - The cost-of-living crisis impacted Meropa Retail through reduced consumer spending. Therefore, it is important to understand how levels of inflation are incorporated into both the revenue and costs lines in the forecast.
- Level of load-shedding and additional costs associated with load-shedding - ie alternative energy costs
  - Load-shedding was a cause of distress. Therefore, it will be important to understand the level of loadshedding forecast in the financial projections and the associated cost of addressing this (and through what means - diesel generator / solar / nothing)

### Question 11

- 11.1 Given that only 80% of the creditors' voting interest was in favour of the business rescue plan, briefly explain the position of the creditors who **did not** vote in favour of the business rescue plan, with reference to the relevant provision(s) of the Companies Act 2008. (2)

Answer:

The plan will be "crammed down" on all of the creditors and they will be bound by the BR plan once adopted. (1)

Refer to the fact that this is established by section 152(4) of the Companies Act 2008. (1)

- 11.2 What is the difference between the effect of enforcement of a business rescue plan on creditors who voted in favour of adoption of the plan versus dissenting creditors? (2)

Answer:

Candidates should explain that the debts owed to dissenting creditors are not discharged. (1) Section 154(2) of the Companies Act 2008 merely limits the ambit of enforcement of the debt. (1)

**TOTAL MARKS: [100]**