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PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE

**Comment and Feedback on Self-
Assessment Questions 2023**





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HOW TO USE THIS DOCUMENT

The purpose of this document is to provide comment and feedback on the self-assessment questions contained in the notes for the **Programme in South African Business Rescue 2023**. Please bear in mind that the primary purpose of the self-assessment questions is to assist you, as a candidate on the course, to understand the various parts of the work as covered in the prescribed notes.

The questions and answers provided in this document follow the same sequence as the notes, so the questions and answers have been arranged by Chapter.

Please note that in addition to the self-assessment questions, you will also undertake a formative (practice) assessment prior to undertaking the summative assessment (examination). The formative (practice) assessment will be made available as a separate document and will be uploaded to the course portal in due course, as per the Course Handbook.

CASE STUDY

Fast Flights Airlines Limited

Fast Flights Airlines Limited (Fast Flights) is a public company duly incorporated and registered as such under the applicable company laws of South Africa. For the past 20 years, Fast Flights has operated a very successful low-cost airline, which made its mark by catering for the sector of the South African airline market that sought economical and efficient domestic air travel without unnecessary frills and expenses. Up until the year 2019, Fast Flights ran a profitable business, and was viewed as one of the “highfliers” of the African airline industry.

Towards the end of 2019, Fast Flights experienced a sharp decline in the demand for its airline tickets. This was primarily due to increasing economic constraints experienced by South African consumers, which were predicated by a stalling South African economy and the start of a global recession. New entrants into the South African airline industry also introduced a novel set of challenges for Fast Flights, in the form of increased competition for market share.

Fast Flights has a large staff complement, which includes pilots, cabin crew, engineers, maintenance and service support personnel, as well as financial and general support staff. A vast majority of Fast Flights’ employees are represented by Fair-Labour-For-All, a South African registered trade union that seeks to advance the interests of employees engaged in the aviation industry.

Prior to the year 2019, Fast Flights aggressively expanded its operations by: (i) acquiring an airline catering company, (ii) increasing its workforce by almost 300 employees (increasing its wage bill by an additional R50 million per month) and (iii) acquiring five aircraft and entering into lease agreements for three additional airplanes to add to its fully owned fleet of 15 aircraft. Following the expansion, the airline operated 23 airplanes in total, had a somewhat successful catering subsidiary business and a large workforce.

Given that the acquisition of aircraft and the catering business required substantial financing and considering that all of the new aircraft were acquired offshore, Fast Flights required and obtained significant loan capital from Big Money Bank, which loans were all based in EURO denominated loan facilities. Big Money Bank was happy to provide such loan facilities to Fast Flights, on the basis that the existing fleet of 15 aircraft would be registered as security in favour of Big Money Bank, pursuant to the registration of aircraft security mortgage bonds.

Due to the downward valuation of the South African Rand to major foreign currencies, in conjunction with an increase in its cash outflows, pursuant to its obligations towards Big Money Bank and its newly hired employees, Fast Flights made substantial losses during the 2019 financial year.

Fast Flights has its head office in Johannesburg and runs the company through its board of directors consisting of a Chief Executive Officer (Mr B Sky), a Chief Financial Officer (Ms L Jet) and three other executive board members. Ms L Jet (an astute chartered accountant) became increasingly concerned about Fast Flights' financial condition and had doubts as to Fast Flights' ability to pay all of its debts as they became due and payable. She was further of the view that it would be reasonably likely that the company's ever-increasing liabilities would exceed its assets in the following financial year. Due to Fast Flights' increasing financial pressure in early 2020, Fast Flights procured the services of a firm of restructuring experts who, with the support of Big Money Bank, would attempt to informally restructure Fast Flights, both financially and operationally.

Under the guidance of the restructuring experts, Fast Flights proceeded to raise equity capital from its shareholders, on the speculative assumption that Fast Flights' expansion strategy would result in increased revenue from airline ticket sales, and significant dividends flowing to its shareholders once the bank loans were paid off. The equity capital raised from shareholders was only sufficient to pay arrear interest on the loans owed to Big Money Bank. Nevertheless, the intervention of the restructuring experts resulted in Fast Flights' becoming solvent and liquid (at least on its balance sheet).

On 26 March 2020, The President of South Africa announced a State of Disaster under the Disaster Management Act 57 of 2002, due to the onset of the global COVID-19 pandemic. The declaration of a National State of Disaster was accompanied by the issuing of various regulations that introduced a whole host of "lockdown" restrictions. As a result of the lockdown restrictions, Fast Flights was no longer allowed to operate domestic or international flights, and as a result, all potential revenue from flying operations came to an immediate halt.

The cessation of a large part of Fast Flights' business meant that the company experienced significant cash shortfalls. As a result, Fast Flights' board of directors came to the conclusion that it appeared reasonably unlikely that the company would be able to pay its debts (including salaries to its employees) at the end of April 2020. Fair-Labour-For-All, in conjunction with the employees of Fast Flights, saw the writing on the wall and engaged their legal advisors to assess the various options available to Fast Flights under South African law, in view of its financial difficulties. In their advice, the legal advisors, refer to business rescue proceedings as a viable option for Fast Flights, which proceedings could be commenced at the instance of Fair-Labour-For-All and the employees of Fast Flights as "affected persons" by way of a court application. Notwithstanding this advice, which set out the various requirements that needed to be satisfied in order to succeed with such an application, no further action was taken by Fair-Labour-For-All and the employees.

Although Fast Flights was no longer able to operate under the lockdown restrictions, the company was still obligated to pay for the maintenance, service, storage and insurance premiums in respect of their 23 aircraft. It was also required to service its various loan facilities with a variety of lenders, including the EURO denominated facilities made available by Big Money Bank. In addition, Fast Flights was also required to pay its employees' salaries. Finally, other critical creditors, such as the Civil Aviation Authority (CAA) and the various Airports had to be paid.

Given Fast Flights' inability to meet all of its obligations to its various creditors, certain creditors of Fast Flights decided to take further legal steps to reclaim amounts owing to them. Firstly, one of Fast Flights' trade creditors that supplied the company with aircraft lubricants and parts issued statutory letters of demand claiming payments that became due and payable by Fast Flights under the terms of the various supply agreements entered into between them.

Secondly, Fast Flights was served with a summons by the lessor of one of the aircraft hangers that was used by Fast Flights to store some of its aircraft. Thirdly, an aggressive, trade creditor that supplied on-board drinks to Fast Flight threatened to institute a liquidation application against Fast Flights. Lastly, one of the aircraft lessors threatened to cancel its lease and an instalment sale agreement with Fast Flights due to the non-payment of rentals and instalment payments that were due under the lease agreement and the instalment sale agreement, respectively.

Given the above, the board of directors of Fast Flights quickly concluded that the company could no longer continue trading in the ordinary course and that it had become financially distressed, as defined. As a result, the board of directors passed and filed a resolution with the Companies and Intellectual Property Commission (the CIPC) for the commencement of voluntary business rescue proceedings. The decision of the board of Fast Flights to commence business rescue was geared mainly at ensuring that Fast Flights benefits from the statutory moratorium on claims, but also to avoid sending out a section 129(7) notice to all of its creditors.

Fast Flights was accordingly placed under business rescue proceedings on 11 May 2020 and one Mr V Bad was appointed as the business rescue practitioner of Fast Flights. A notice of his appointment was filed and published in the manner contemplated by the Companies Act 2008.

Ms L Jet was largely in favour of the commencement of the business rescue process, but was very concerned at the possibility that liquidation applications in respect of Fast Flights may have been filed with the High Court prior to the date on which the resolution commencing business rescue was passed. She however confirms that no liquidation applications were served on Fast Flights as at the date when the resolution commencing business rescue was adopted and filed with the CIPC and that Fast Flights was not aware of any such application.

It was later discovered that Mr V Bad, unbeknown to the board, was found guilty in disciplinary proceedings brought against him by the professional body to which he belonged, with the result that his membership was revoked. On the basis that Mr V Bad was no longer a member in good standing of a legal, accounting or business management profession accredited by the CIPC, and as such, Mr V Bad was removed as the business rescue practitioner of Fast Flights and was replaced by Mr A Float on 15 June 2020, following certain court processes.

Immediately upon his appointment as replacement business rescue practitioner, Mr A Float scheduled a first meeting of creditors, and subsequent to that begun to investigate the affairs of Fast Flights. During the course of this investigation and following consultations with Big Money Bank, it became apparent to Mr A Float that the CEO of Fast Flights, Mr B Sky, has bound himself as surety for the debts of the company in an amount of R100 million, pursuant to a written suretyship. Mr B Sky is of the view that his obligations under the suretyship have been relinquished by virtue of the fact that Fast Flights has been placed into business rescue. It also comes to light that, that the CFO, Ms L Jet is married to the business rescue practitioner's brother. Lastly, it was discovered that Mr C Turbulence, one of Fast Flight's executive directors, has been involved in shady dealings with Royal Fuels (a jet fuel supplier) prior to the commencement of the business rescue proceedings.

It also becomes apparent during the course of this investigation that, Mr L Block, a senior director of Fast Flights, has been obstructive towards Mr A Float and has severely hampered and impeded the business rescue practitioner's execution of his statutory duties. Mr A Float engages a firm of attorneys to explore ways to have Mr L Block removed as a member of the board.

In addition to investigating the affairs of Fast Flights, immediately after his appointment Mr A Float undertook a process of examining all of Fast Flights' ongoing expenses, in an effort to reduce unnecessary overhead costs and operating expenditure, wherever possible. He quickly determined that Fast Flights' aggressive expansion in 2019, which resulted in the increase of its workforce by almost 300 employees, coupled with the mitigating socio-economic circumstances, was a primary contributing factor to their financial distress. However, due to Fast Flights' financial constraints, he was unable to offer any employees voluntary separation packages, but he was confident in his intention to include provisions regarding the reduction of the workforce in his proposed business rescue plan.

During the course of business rescue proceedings, it was also discovered that Fast Flights had entered into certain prejudicial contracts prior to the commencement of business rescue proceedings and that were hindering the effective rescue of the company. These contracts included various airline storage and baggage handling contracts. Mr A Float also identified certain expensive aircraft lease agreements that he wished to cancel, with the view of reducing the company's expenses. The payment obligations under the various contracts became due and payable during the course of the business rescue proceedings of Fast Flights. Mr A Float recalls learning that business rescue practitioners have the ability to suspend and / or cancel contracts pursuant to the provisions of the Companies Act 2008, but was not certain as to whether this was possible, as he had not done so before.

Mr A Float, in accordance with his statutory duties, consulted with the various lenders and shareholders of Fast Flights to establish whether there was a possibility of either of them providing post-commencement finance to the company. During these consultations, Big Money Bank expressed its concern about the status of the facilities made available by it prior to the commencement of business rescue proceedings, and whether such facilities would be treated differently than any new facilities provided during the business rescue proceedings. To alleviate Big Money Bank's concerns, Mr A Float requests his assistant Ms C Clerk, who has in-depth knowledge of the various provisions of the Companies Act 2008, to prepare a presentation outlining the legal position relating to post-commencement finance, for the benefit of Fast Flights' lenders and shareholders.

Mr A Float, in addition, requests Ms C Clerk to furnish him with a brief legal opinion setting out the pertinent provisions of the Companies Act 2008 relating to the remuneration of business rescue practitioners, as he wanted to know whether the amounts he had been earning to date were in accordance with the Companies Act.

At this stage, certain creditors of Fast Flights became frustrated by Fast Flights' failure to make payment of certain amounts owed to them, and subsequently elected to take legal steps to reclaim amounts owing to them. Fast Flights was, accordingly, served with two summons and a money judgment applications in the Gauteng High Court. Another creditor proceeded to issue a liquidation application against Fast Flights. All the while, certain other creditors cancelled the agreements entered into with Fast Flights, due to the non-payment of amounts due thereunder. Mr A Float and the board of directors are bewildered by the pursuant legal onslaught and are worried about how these legal proceedings will affect the business rescue proceedings of Fast Flights.

Notwithstanding the aforementioned legal challenges, Mr A Float began preparing and drafting the business rescue plan of Fast Flights for consideration by creditors at a section 151 meeting of creditors. In accordance with his determination that Fast Flights needed to drastically reduce its workforce, the business rescue plan contemplated the retrenchment of a large portion of Fast Flights' employees. The retrenchment proposal immediately resulted in tension between Fair-Labour-For-All and the business rescue practitioner. This tension was exacerbated by the fact that the employees of Fast Flights had not been paid their salaries for the duration of the business rescue process. The business rescue plan furthermore did not specify the status of the employees' unpaid salaries, which was of grave concern to them.

Included in the business rescue plan is, *inter alia*, the following information: (i) creditors include R4 billion secured creditors (lenders), R4 billion unsecured creditors and a further R2 billion inter-company claim from its catering subsidiary, which has been subordinated in favour of the secured lenders, and (ii) a footnote in the forecast notes that the business rescue practitioner is earning remuneration in excess of the tariff rates.

Nevertheless, the business rescue plan was published by Mr A Float on 1 August 2020 and was put to the vote at the meeting of creditors. The business rescue plan was approved by the requisite majority of creditors. However, Jumbo Jet Proprietary Limited, a minority creditor, voted against the plan on the basis that he genuinely believed that the plan would impose financial risks on himself as well as other creditors, and as a result was of the view that it was not bound by the terms of the approved business rescue plan at all. Subsequently, another minority creditor, Engines Proprietary Limited, made an offer to purchase the voting interests of Jumbo Jet Proprietary Limited.

Mr A Float proceeded to implement the business rescue plan. The business rescue proceedings of Fast Flights continued over a protracted period of time, but despite this, Mr A Float was of the view that it would be completely unnecessary to report on the progress of the business rescue proceedings, given that to do so would be very onerous.

After the business rescue proceedings of Fast Flights had gone on for 18 months, it became apparent that Fast Flights was un-rescuable, despite the best efforts of Mr A Float and the board of directors. Consequently, Mr A Float began exploring the different avenues, in terms of which the business rescue proceedings of Fast Flights could be terminated. He engages a firm of attorneys to explore ways in which to exit the business rescue process and to place Fast Flights into liquidation. The firm of attorneys furnish him with legal advice.

Some financial statements (balance sheet and income statement) for Fast Flights Airlines Ltd have been provided on the next two pages.

Balance Sheet
Statement of Financial Position as at 31 December 2019
Fast Flights Airlines Ltd

	2019 R'000s	2018 R'000s
ASSETS		
Non-current assets		
Property, plant and equipment	6,320,000	6,100,000
Intangible assets	30,000	30,000
	6,350,000	6,130,000
Current assets		
Inventories	22,000	20,500
Trade and other receivables	530,000	500,000
Cash and cash equivalents	540,000	475,000
	1,092,000	995,500
Total assets	7,442,000	7,125,500
EQUITY AND LIABILITIES		
Equity		
Share Capital	5,000	5,000
Accumulated profits	2,141,500	2,760,500
Total equity	2,146,500	2,765,500
Liabilities		
Non-current liabilities		
Interest-bearing liabilities	2,340,000	2,180,000
Current liabilities		
Trade and other payables	1,330,000	985,000
Unutilised ticket liability	380,000	310,000
Provisions	98,000	135,000
Interest-bearing liabilities	1,147,500	750,000
	2,955,500	2,180,000
Total equity and liabilities	7,442,000	7,125,500

Income Statement
Statement of profit or loss for the year ended 31 December 2019
Fast Flights Airlines Ltd

	2019 R'000s	2018 R'000s
Revenue	7,125,000	6,500,000
Operating expenses	- 6,900,000	- 5,400,000
	225,000	1,100,000
Depreciation and amortisation	- 590,000	- 440,000
Property rental income	6,000	-
Profit / (loss) from operations	- 359,000	660,000
Interest expense	- 260,000	- 150,000
Profit / (loss) before tax	- 619,000	510,000
Taxation	-	120,000
Profit / (loss) for the year	- 619,000	630,000

CHAPTER 1 - INTRODUCTION**Self-Assessment Questions****Question 1**

Which of the following statements is / are correct in relation to business rescue proceedings in terms of the Companies Act 2008?

- (a) The restructuring of companies in financial distress is on the increase globally.
- (b) The worldwide trend is not to attempt to rehabilitate financially distressed companies, instead the globally accepted trend is to simply liquidate them regardless of their viability and prospects of being rescued.
- (c) Business rescue encapsulates a shift from creditors' interests to a broader range of interests, that is, a shift from a creditor-focused culture of liquidation to a rescue-oriented approach where there is an emphasis on the balancing of the rights and interests of all relevant stakeholders.
- (d) Both (a) and (c).

Answer

The correct answer is (d).

Question 2

Which of the following statements is incorrect in relation to business rescue proceedings in terms of the Companies Act 2008?

- (a) Business rescue is virtually identical to the old judicial management procedure.
- (b) Business rescue proceedings are creditor-focused and do not consider the interests of other stakeholders such as employees and trade unions.
- (c) The supervision of business rescue proceedings falls within the jurisdiction of the Magistrate's Court and not the High Court.
- (d) All of the above.

Answer

The correct answer is (d).

Question 3

Select the correct statement:

What are the objectives of the business rescue process as set out in Chapter 6 of the Companies Act 2008?

- (a) The development and implementation of a business rescue plan to rescue the financially distressed company, which plan has the aim of allowing the company to continue in existence on a solvent basis.
- (b) To provide a better return for the financially distressed company's creditors or shareholders than would result from the immediate liquidation of the company, by way of "quasi-liquidation" or "controlled wind-down".
- (c) Both (a) and (b).
- (d) None of the above.

Answer

The correct answer is (c).

Question 4

Briefly describe the two entry routes into business rescue and the requirements for each.

Answer

- There are two entry routes into the business rescue process;
- The first route is a company resolution (voluntary commencement);
- In terms of section 129(1) of the Companies Act 2008, a company's board of directors can pass a resolution in terms of which the company resolves to commence the business rescue process;
- In order for a company to commence business rescue proceedings on a voluntary basis, the board must have reasonable grounds to believe that the company is financially distressed and that there appears to be a reasonable prospect of rescuing the company;
- The second route is a formal court application by an affected person (compulsory commencement);
- Compulsory business rescue begins with an affected person (creditor, shareholder, registered trade union, employee or employee representative) applying to the High Court to place the company concerned in business rescue.

Question 5

Briefly discuss the moratorium as provided for under section 133 of the Companies Act 2008.

Answer

- A primary aim of business rescue proceedings is to offer a distressed company some breathing space to allow its affairs to be restructured in such a way as to allow it to continue to operate as a going concern;
- This is achieved by way of a general moratorium (stay) on claims;
- Section 133 of the Companies Act 2008 provides that during business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except with the written consent of the practitioner or with the leave of the court and in accordance with any terms the court considers suitable.

Question 6

Briefly describe post-commencement finance.

Answer

- After being placed into business rescue, the financially distressed company will require ongoing finance to keep it operational;
- Post-commencement finance has been referred to as the life-blood of the company while it is under business rescue;
- Post-commencement finance is funding that is provided to the company after the date of commencement of business rescue proceedings and has an elevated status above the claims of the company's pre-business rescue creditors.

CHAPTER 2 - COMMENCEMENT OF BUSINESS RESCUE**Self-Assessment Questions**

Where necessary, refer to the Case Study when answering the questions below.

Question 1

Shortly after his appointment as the business rescue practitioner, Mr A Float discovered that Fast Flights had only notified Fair-Labour-For-All of the filing of the business rescue resolution. No attempt had been made to notify the remaining 9% of employees who were either members of an unregistered trade union or not members of any trade union.

Mr Float is worried about the effect or potential effect this omission could have on the validity of the business rescue proceedings. Explain the legal position to him with reference to the Companies Act 2008, the Company Regulations 2011 and case law.

Answer

The answer to this question requires a discussion of the following with reference to the specific facts of the case study: -

- section 129(3)(a) - duty to notify affected persons of filing of business rescue resolution;
- section 128(1)(a) - inclusion of employees who are not members of a registered trade union;
- regulation 123(2) - how employees must be notified;
- section 129(5)(a) - effect of non-compliance with s 129(3);
- section 6(9) and *Ex parte Van den Steen* - can it be said that in this case there was substantial compliance?;
- *The Commissioner for the South African Revenue Service v The Business Zone 983 CC*;
- *Panamo Properties (Pty) Ltd v Nel and Others NNO* and section 130(1)(a)(iii) - effect of non-compliance depending on whether a rescue plan has been approved as yet.

Question 2

At the first meeting of creditors, the three creditors who took, or threatened to take steps to enforce their claims before the board resolution was filed, inform Mr Float that in their view the resolution and thus the business rescue was void because the resolution was adopted after they had taken the first steps to have the company liquidated. Advise Mr Float whether there is any merit in their argument.

Answer

Your answer to this question must cover the following -

- Section 129(2)(a) - resolution may not be adopted if liquidation proceedings have been initiated;
- Meaning of "initiated" as interpreted in the four cases in your notes where this was specifically dealt with;
- Your view on what the correct interpretation is when the judgment in *Lutchman NO v African Global Holdings (Pty) Ltd* is considered or whether there are good reasons why the SCA could or should deviate from this approach when interpreting s 129(2)(a);
- Whether the actions by the creditors could be interpreted as the initiating of liquidation proceedings, based on any of the interpretations found in the cases.

Question 3

Section 129(3)(a) requires that the notice of filing of a business rescue resolution must be accompanied by an affidavit setting out the facts regarding the grounds on which the board resolution was taken. Practice Note 3 of 2021 contains more detailed instructions on how this should be done. Draft the relevant part of the affidavit in which these reasons and grounds are explained as they existed at the time of taking the resolution.

Answer

Section 129(1) contains the grounds on which a company's board may take a resolution to place the company in business rescue and when setting out the grounds on which the resolution was taken, both requirements must be covered: financial distress and a reasonable prospect of rescuing the company.

Practice Note 3 of 2021 repeats this by requiring reasons for taking the resolution and a clear indication of what caused the financial distress. The answer should therefore explain all the contributing factors that caused the company to fall into financial difficulties and then it must also make out a convincing case why there is a prospect of rescuing the company. This would cover the requirement in the Practice Note that the affidavit must contain a preliminary plan to address the financial distress.

Question 4

Advise Mr Float on the correct and appropriate way to terminate the business rescue proceedings in the circumstances set out in the final paragraph of the Case Study.

Answer

The answer to this question needs to include a discussion of:-

- Section 132(2)(a) dealing with the termination of business rescue proceedings and the subsequent liquidation of the company;
- The duty of Mr Float to terminate the proceedings in terms of s 141(2)(a) if “at any time” he concludes that there is no reasonable prospect of a rescue. Can this be taken as an indication that even after approval of the plan such an application can be made?
- The judgment in *Commissioner for the South African Revenue Services v Louis Pasteur Investments (Pty) Ltd* that an application for termination may be made by a creditor even after approval of a rescue plan.
- The judgment in *The Commissioner of South African Revenue Service v Primrose Gold Mines (Pty) Ltd and 2 Others* but contradicted by *Ex parte Target Shelf 284 CC*.
- The Notice of Termination (Form CoR 125.2) that must be filed and the confirmation required by the CIPC in Practice Note 3 of 2021.

CHAPTER 3 - THE GENERAL MORATORIUM**Self-Assessment Questions****Question 1**

Where necessary, please refer to the Case Study when answering the questions below. Answer questions 1.1 to 1.10 by indicating whether the relevant statement is TRUE or FALSE.

Question 1.1

Fast Flights does not enjoy any protection against legal proceedings being instituted against it despite being in business rescue, with the result that the creditors who have served it with summons and money judgment applications in the Gauteng High Court are entitled to institute and continue with those legal proceedings as if Fast Flights was not in business rescue.

Answer

False. By virtue of being in business rescue, Fast Flights does enjoy protection against legal proceedings instituted against it as a result of the moratorium provided for in section 133(1) of the Companies Act. This means the creditors who have served it with summons and money judgment applications in the Gauteng High Court would be entitled to institute and continue with those legal proceedings only with the consent of the business rescue practitioner or the leave of the court. Thus, those creditors are not entitled to institute and continue with those legal proceedings as if Fast Flights was not in business rescue.

Question 1.2

To enable it to restructure its affairs, Fast Flights does not need any moratorium on the summons and money judgment applications served on it after business rescue.

Answer

False. The general moratorium on legal proceedings is one of the most important features of business rescue and necessary to enable a company in business rescue to restructure its affairs. It affords the company in business rescue sufficient breathing space to restructure its affairs. The importance of that has also been judicially recognised by a number of cases since the introduction of chapter 6 of the Companies Act 2008. In the case of *Marie NO and another v First Rand Bank Limited* 2015 (3) SA 438 (SCA), the Supreme Court of Appeals stated that:-

"It is generally accepted that a moratorium on legal proceedings against a company under business rescue is of cardinal importance since it provides the crucial breathing space or a period of respite to enable the company to restructure its affairs. This allows the practitioner, in conjunction with the creditors and other affected parties to formulate a business rescue plan designed to achieve the purpose of the process."

Question 1.3

As the creditors who served summons and money judgment applications on Fast Flights had not been paid, they were entitled to institute legal proceedings against Fast Flights post-business rescue without obtaining consent from the business rescue practitioner, Mr A Float.

Answer

False. All legal proceedings instituted post business rescue either by way of summons or money judgment applications require the consent of the business rescue practitioner or leave of the court as stipulated in section 133(1) of the Companies Act.

Question 1.4

Because the summons which was served by the lessor of one of the aircraft's hangars was served before Fast Flights was placed in business rescue, that summons is not affected by the moratorium that came into effect when Fast Flights was subsequently placed in business rescue, with the result that the lessor in question is entitled to proceed with that summons until the legal action is finalised, as if Fast Flights was not subsequently placed in business rescue.

Answer

False. The moratorium does not only affect legal proceedings which are instituted post business rescue. It also stays or suspends the prosecution of legal proceedings which were instituted against Fast Flights before it was placed in business rescue.

Question 1.5

Should the lessor of one of the aircraft's hangars who issued summons before Fast Flights was placed in business rescue wish to continue and proceed with the summons after Fast Flights was placed in business rescue, and should Mr A Float refuse to consent to the continuation of that legal action, then there is nothing that the lessor can do in order to continue or proceed with that legal action.

Answer

False. Should the business rescue practitioner refuse to consent to the continuation of the legal action in question by the lessor, then the lessor is entitled to apply to court for leave to continue with the legal action in question, as provided for in section 133(1) of the Companies Act.

Question 1.6

Should the lessor of one of the aircraft's hangars who issued summons before Fast Flights was placed in business rescue wish to continue with that summons post-business rescue, it would be legally permissible for the lessor to proceed with that legal action if Mr A Float gives verbal consent to that effect.

Answer

False. Section 133(1) stipulates that the business rescue practitioner's consent needs to be **in writing**, with the result that a verbal consent would not suffice for purposes of lifting the moratorium.

Question 1.7

One of Fast Flights' trade creditors that issued statutory letters of demand for payment that was due and payable in respect of aircraft lubricants and parts should urgently issue summons against Fast Flights despite the fact that Fast Flights was subsequently placed in business rescue, because the time limit for the enforcement of such a claim will not be suspended under business rescue even if the enforcement of such a claim was subject to a time limit.

Answer

False. If the enforcement of any claim against the company in business rescue is subject to a time limit, section 133(3) of the Companies Act stipulates that the time limit prescribed for the enforcement of such a claim will be suspended for the duration of the business rescue proceedings.

Question 1.8

The lessor who threatened to cancel its lease and instalment sale agreement due to non-payment by Fast Flights would be precluded from cancelling those agreements post-business rescue as a result of the moratorium which is created by Fast Flights' business rescue.

Answer

False. The moratorium does not extend to juristic acts such as the cancellation of an agreement. This means the lessor who threatened to cancel its lease and the instalment sale agreement due to non-payment would not be precluded from cancelling those agreements post business rescue as a result of the moratorium. This means that the lessor would not be required to lift the moratorium by way of obtaining a consent from the business rescue practitioner or leave of the court for purposes of cancelling the agreements in question.

Question 1.9

Had Fast Flights already been in business rescue at the time the letters of demand were issued for payment of the monies which were due and payable for the aircraft lubricants and parts which were supplied in terms of the supply agreements, those letters of demand would have been affected by the moratorium, with the result that the creditor concerned would have been required to first obtain the business rescue practitioner's consent or leave of the court before issuing those letters.

Answer

False. The moratorium does not extend to juristic acts such as dispatching of letters of demand. This means that it is not necessary to lift the moratorium by obtaining the business rescue practitioner's consent or leave of the court for purposes of issuing a letter of demand for payment of monies which are due and payable in terms of an agreement.

Question 1.10

When Fast Flights was placed in voluntary business rescue on 10 April 2020 by way of a board resolution which was filed with the CIPC, all and any legal proceedings that were instituted before Fast Flights was placed in business rescue were not automatically stayed because the CIPC did not issue a statutory notice confirming that all legal proceedings against Fast Flights have been stayed or prohibited.

Answer

False. The moratorium comes into effect automatically when the company is placed in business rescue. It is not a requirement for CIPC to issue a statutory notice confirming the existence of the moratorium.

Question 2

What is the duration of the moratorium that applies when a company is placed in business rescue?

Answer

The moratorium applies for the duration of the company's business rescue proceedings. Having said that, section 150(2)(b)(i) stipulates that a business rescue plan may provide for the moratorium to extend beyond the duration of the business rescue proceedings. Henochsberg however submits that such moratorium will not be as wide as the one envisaged in section 133. It must be specific in that it should apply to a specific creditor, class of creditors or to particular circumstances warranting the extension of a moratorium beyond the duration of the business rescue proceedings.

Question 3

What is the meaning of "legal proceedings" and "enforcement action" envisaged in section 133 of the Companies Act 2008? Your answer should address what the Companies Act 2008 and the relevant case law say regarding the meaning of these terms.

Answer

Unfortunately chapter 6 is silent on the meaning of "legal proceedings" or "enforcement action". However in *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC* 2013 (6) SA 540 (WCC), the court held that the intention of section 133 is clear: it is to cast the net as wide as possible in order to include any conceivable type of action against a company such as liquidation proceedings.

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, specifically including that of formal proceedings instituted to perfect security.

In *Cloete Murray and Another NNO v Firstrand Bank t/a Wesbank* 2015 (3) SA 438 (SCA), the court held that the cancellation of the master instalment agreement during business rescue proceedings was not a "legal proceeding, including enforcement action", requiring the written consent of the business rescue practitioner or leave of the court. "Enforce" and "enforcement" usually refer to the enforcement of obligations.

The SCA was of the view that “enforcement action” was therefore a species of legal proceedings. This conclusion was augmented by the fact that section 133(1) provides that “no legal proceeding, including enforcement action... may be commenced or proceeded with in any forum”. Additionally, the court held that the terms “enforcement” and “cancellation” are mutually exclusive. The term “cancellation” refers to the termination of obligations between parties to an agreement.

Question 4

If the aircraft lessor who threatened to cancel its lease and instalment sale agreement with Fast Flights due to non-payment of rentals and instalment payments respectively, had validly cancelled those agreements before business rescue and instituted legal proceedings after Fast Flights was placed in business rescue for the return of the aircrafts which had been given to Fast Flights pursuant to those agreements, would the moratorium extend to those proceedings and, if so or if not, explain why. Your answer should refer to the relevant and applicable provision(s) of the Companies Act 2008 and case law.

Answer

The moratorium would not extend to those proceedings for *inter alia* the following reasons:-

1. Section 133 provides *inter alia* that the moratorium only extends its protection to anyone attempting to lay claim to the company’s own property or lawfully in its possession. This means that the moratorium is thus not applicable to legal proceedings in respect of property belonging to another company or property in the unlawful possession of the company in business rescue;
2. With that in mind, the aircrafts are not the property of Fast Flights as they are owned by the lessor who had leased them to Fast Flights, in terms of the relevant lease agreement and instalment sale agreement. Additionally, those aircrafts ceased being in lawful possession of Fast Flights once the agreements pursuant to which possession was given to Fast Flights were validly cancelled before the institution of the legal proceedings in question;
3. In *Madodza (Pty) Ltd v Absa Bank Limited and Others* 38906/2012, 15 August 2012 (GNP) at para 12, the court found that certain vehicles that were subject to finance agreements which had been validly cancelled were not lawfully in the possession of the company in business rescue with the result that section 133(1) was not an impediment to the recovery of the vehicles. The court further found that whenever a company lacks the right to possess an asset, it is not in lawful possession of it and it cannot be protected by section 133(1);

4. In *Kythera Court v Le Rendez Vous Cafe CC and Another* 2016 (6) SA 63 (GJ):-

- 4.1 before the commencement of business rescue, the company fell into arrears in respect of its rental obligations;
- 4.2 The landlord therefore cancelled its lease after the commencement of business rescue proceedings;
- 4.3 The company refused to vacate the premises on the basis of section 133 and argued that the landlord was precluded from cancelling the lease and launching the eviction application;
- 4.4 The court held that the juristic act of cancelling a lease agreement does not constitute an enforcement action in terms of section 133(1) and it was therefore permissible for an agreement to be cancelled during business rescue proceedings;
- 4.5 The court confirmed that the moratorium does not apply when the property in question does not belong to the company in business rescue or is not lawfully in its possession;
- 4.6 Thus, eviction proceedings in relation to property not in lawful possession of a company in business rescue are permissible.

Question 5

Does the Labour Court have jurisdiction over business rescue matters, including employment-related claims which a party may wish to pursue by instituting legal proceedings against a company in business rescue? Substantiate your answer with reference to the relevant case law.

Answer

The Labour Court does not have jurisdiction over business rescue matters including employment related claims which a party may wish to pursue by instituting legal proceedings against a company in business rescue.

The High Court has exclusive jurisdiction over business rescue matters because business rescue proceedings affect the rights of a number of parties beyond the employment relationship and, in particular, shareholders and other creditors. That is why the High Court is therefore most suitable to balance the rights and interests of all relevant stakeholders.

In *National Union of Metal Workers of South Africa (NUMSA) obo members and Others v South African Airways and Others* (2021) 42 ILJ 1256 (LC), the Labour Court confirmed that the High Court has exclusive jurisdiction over business rescue matters with the result that a party seeking to institute proceedings, including those that concern employment related claims, against a company in business rescue, must obtain written consent of the business rescue practitioner or leave of the **High Court** to institute such proceedings.

Question 6

The general rule is that the moratorium created by section 133 of the Companies Act 2008 stays or suspends the institution or continuation of legal proceedings. List the exceptions to this general rule where legal proceedings may be instituted or proceeded with despite the company being in business rescue.

Answer

- section 133(1)(a) - with the written consent of the business rescue practitioner;
- section 133(1)(b) - with the leave of the court;
- section 133(1)(c) - set off against any claim made by the company in any legal proceedings;
- section 133(1)(d) - criminal proceedings against the company or any of its directors or officers;
- section 133(1)(e) - proceedings concerning any property or right over which the company exercises the powers of the trustee;
- section 133(1)(f) - proceedings by a regulatory authority and the execution of its duties after written notification to the business rescue practitioner.

Question 7

List the instances where neither the consent of the business rescue practitioner nor the leave of the court is required for purposes of instituting legal proceedings against the company in business rescue.

Answer

- Where an affected person exercises the right in terms of section 130(1) to set aside the voluntary business rescue process initiated in terms of section 129;
- An application to remove a business rescue practitioner in terms of section 139;
- Any proceedings relating to the business rescue plan proposed by the business rescue practitioner.

Question 8

In relation to the summons that was served on Fast Flights before it was placed in business rescue by the lessor of one of the aircraft hangars for payment of the rental owing to the lessor:-

Question 8.1

What is the minimum requirement or threshold that the lessor would have to establish in the court application should they seek leave to continue with that summons against Fast Flights after 10 April 2020 (that is, the date on which Fast Flights was placed in business rescue)?

Answer

The court in *Arendse and Mabote* held that an applicant seeking leave of the court must at least establish a *prima facie* case against the company in business rescue.

Question 8.2

What factors will the court consider when determining whether or not to grant the leave sought by the lessor?

Answer

In *Arendse* the court held that it will consider the following factors:-

1. The effect that the grant or refusal of leave would have on the applicant's rights as opposed to the other affected persons and relevant stakeholders;
2. The impact of the proposed legal proceedings would have on the wellbeing of the company and its ability to regain its financial wealth;
3. Whether the grant of leave would be inimical to the object and purpose of business rescue proceedings as set out in section 7(k) and 128(b) of the Companies Act.

Question 8.3

Based on the facts of the Case Study, advise whether the lessor is likely to discharge the minimum threshold / requirement referred to in question 8.1 above, and why.

Answer

It would appear from the facts of the case study that the lessor's claim for moneys owing by Fast Flights for the aircraft hangars which it hired from the lessor to store some of Fast Flights' aircraft is undisputed. Thus, it is likely that the lessor will succeed in establishing a *prima facie* case against Fast Flights for the monies owing to it in respect of the rental.

Question 8.4

With reference to the relevant facts of the Case Study and factors to be considered by the court, advise whether you are of the opinion that the court is likely to grant the leave sought by the lessor, and why.

Answer

If leave is granted:-

1. Judgment may be granted against Fast Flights which is already in financial distress;
2. This would defeat the purpose of the moratorium;
3. It will have an adverse impact on the financial health of Fast Flights;
4. It will have an adverse impact on the prospect of rescuing Fast Flights;
5. It will have the effect of favouring and prioritising the interest of one creditor (the lessor) instead of balancing the rights of all the relevant stakeholders as contemplated in section 7(k) and facilitating the rehabilitation of a company in financial distress as contemplated in section 128(b) of the Companies Act;
6. If however, leave is refused:-
 - 6.1 The lessor's right to pursue the legal action in question is not extinguished as it is temporarily stayed;
 - 6.2 The lessor is temporarily precluded from obtaining monetary judgment;
 - 6.3 This will give Fast Flights the breathing space it needs to restructure its affairs and deal with the landlord's claim in the business rescue plan together with the claims of other creditors;
 - 6.4 It will save Fast Flights from incurring legal costs of having to defend the lessor's summons;
 - 6.5 The prospects of rescuing Fast Flights will be enhanced and the chances of all the creditors being paid (whether in part or in full) will be improved together with the prospects of saving jobs;
7. In light of the above, the court is unlikely to grant the lessor leave.

Question 9

With reference to the relevant and applicable provisions of the Companies Act 2008 and relevant case law, advise the CEO of Fast Flights, Mr B Sky, whether he is correct in contending that his obligations under the suretyship he signed for the debts of Fast Flights in the amount of R100 million (in favour of Big Money Bank) are relinquished by virtue of Fast Flights having been placed in business rescue.

Answer

- 1 Section 133(2) provides that a guarantee or surety by a company under business rescue in favour of any other person may not be enforced by any person against the company except with the leave of the court and in accordance with any terms the court considers just and equitable in the circumstances. This protection contained in section 133(2) is not available to Mr B Sky, as it would have been available to Fast Flights if it had bound itself as surety for the debts of a third party in favour of Big Money Bank.
- 2 In *Investec v Bruyns*, the defendant was sued as surety for the debts of two companies and raised a defence that the statutory moratorium in terms of section 133(1) in favour of the principal debtors (the two companies in business rescue) would preclude the plaintiff from enforcing its claim against the surety defendant. The court therefore considered section 133(1) and 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 business rescue practitioner or, presumably failing such consent, with the leave of the court. Section 133(2) is a special provision dealing specifically with the enforcement of claims against a 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 the company of claims based on guarantees and suretyships. 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".
- 3 Most importantly, the court found that the statutory moratorium created by section 133(1) is a personal defence (for example 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 stated that "If the lawmaker intended to prohibit creditors from enforcing their claims against sureties of companies undergoing business rescue proceedings, it would have done so". This was later confirmed by the SCA in *Newport Finance Company (Pty) Ltd and Another v Nedbank; Mostert and Another v Nedbank Limited*.
- 4 In the circumstances, Mr B Sky's contention that his obligations under the suretyship have been relinquished by virtue of Fast Flights being placed in business rescue is legally incorrect and inconsistent with the legal position.

CHAPTER 4 - THE STATUS OF PROPERTY INTERESTS IN THE BUSINESS RESCUE PROCEDURE

Self-Assessment Questions

Where necessary, refer to the Case Study when answering the questions below.

Question 1

Indicate whether the following statements are TRUE or FALSE. Provide reasons for your answer.

Question 1.1

“Disposal” as defined in section 134 of the Companies Act 2008 simply means to sell any assets of the company in business rescue.

Answer

False

Question 1.2

Considering the general moratorium on enforcement actions, a business rescue practitioner is not obliged to give reasons for refusing to give permission for an affected party to take possession of their own assets.

Answer

False

Question 1.3

If a business rescue practitioner bona fide consents to the disposal of an asset of the company for value in an arm’s length transaction, but does not do so in writing, such agreement is considered void.

Answer

False

Question 1.4

Section 134 of the Companies Act 2008 has not changed the common law rights of secured creditors.

Answer

True

Question 2

In addition to the registration of an aircraft security mortgage bond, Big Money Bank insisted on a cession, in securitatem debiti, of the shares and the loan account of Fast Flights in its newly acquired catering company. The business rescue practitioner has identified the potential sale of this catering company as a source of emergency funding in order to finance the ongoing operational expenses of Fast Flights during business rescue proceedings. Briefly describe the options available to the business rescue practitioner and what would be the requirements for the practitioner to enter into such a disposal.

Answer

A transaction such as this cannot be in the ordinary course of business for Fast Flights – section 134(1)(a)(i).

The business rescue practitioner would have to consider whether such a transaction would be considered as *bona fide*, at arm's length and for value. Assuming the need for cash is urgent and the sale can continue as long as the transaction meets the requirements of section 134(1)(a)(ii).

Considering the unusual nature of the proposed transaction it would be more prudent to consider such a transaction only pursuant to an adopted business rescue plan authorising such disposal. Section 134(1)(a)(iii), but urgency may make this safer option unrealistic.

Even if the business rescue practitioner considers the disposal as *bona fide*, the shares and loan account are subject to a cession in favour of Big Money Bank. Where there was initial debate as to whether a holder of a cession of rights held a "security interest", as defined in the Act, and further whether a business rescue practitioner could suspend such obligation. Our Courts have now brought finality to the debate with the unambiguous judgment of *Van den Heever vs Van Tonder*, confirming that a holder of a cession of rights, *in securitatem debiti*, has a "security interest" and is a secured creditor as envisaged in section 134.

If the proceeds of the intended sale are insufficient to settle the indebtedness of the secured creditors, then the business rescue practitioner cannot dispose of these assets without obtaining the secured creditors prior consent. If however the proposed sale will realise sufficient proceeds to settle the secured creditor in full, then the business rescue practitioner would not need the creditors written consent, or settling the secured creditor in full from the proceeds of the secured asset as required in section 134(3).

Question 3

Pickled Plum, one of Fast Flights' jet fuel suppliers, had four months prior to the commencement of business rescue proceedings insisted on additional security for an extended line of credit. Fast Flights agreed and a general notarial bond was registered over all the movable assets of Fast Flights.

Briefly discuss:

- (a) the security interest, if any, of Pickled Plum; and**
- (b) the requirements, if any, if the practitioner wishes to continue to utilise these assets or any proceeds derived from these assets during business rescue proceedings.**

Answer

- (a) A general notarial bond only confers a preference to its holder, upon liquidation, and then only after the statutory preferences and before other concurrent creditors. This "preference" is only triggered in terms of the laws of insolvency. Pickled Plum would further be unable to apply to court for the perfection of their general notarial bond, without the consent of the business rescue practitioner.
- (b) As Pickled Plum's general notarial bond only confers preference in the event of a liquidation, the assets subject to the general notarial bond remain unsecured and the business rescue practitioner will be able to utilise the assets in the normal course without their consent.

Question 4

Easy Seats had supplied Fast Flights with specially branded seats to be used on their five newly acquired aircraft. Fast Flights could not afford the initial additional capital required for these custom-made seats and it was agreed with Easy Seats that the purchase price would be paid over a period of 36 months in equal instalments, and that the ownership of these easily identifiable seats would remain with Easy Seats until such time as the purchase price had been settled in full.

At the commencement of business rescue, Fast Flights were not in arrears with the payment of these agreed monthly instalments, but Easy Seats is not convinced that Fast Flights will be able to continue to honour their contractual commitments in this regard. Briefly discuss and describe Easy Seats' interest in the business rescue and whether or not they would be entitled to insist on the immediate return of the property.

Answer

The transaction described references a reservation of ownership, with a provision that ownership will pass once the purchase price, as agreed, is paid in full. The transaction meets the requirements of an installment sale agreement as defined in the Insolvency Act. Unlike in the event of Insolvency where ownership passes to the liquidated entity upon liquidation, ownership of the items (seats) in question remains with Easy Seats. The seats are thus not an asset that the business rescue practitioner can dispose, without Easy Seats consent as owner.

Contractually the business rescue practitioner must consider whether he intends for Fast Flights to continue to meet its contractual obligation or whether he intends to suspend them. On the facts there has not been any breach as at the commencement of business rescue. Easy Seats cannot insist on the return of the seats just because Fast Flights filed for business rescue.

CHAPTER 5 - POST COMMENCEMENT FINANCE (PCF)**Self-Assessment Questions**

Where necessary, refer to the Case Study when answering the questions below.

Question 1

Fast Flights has a large staff complement, which includes pilots, cabin crew, engineers, maintenance and service support personnel, as well as financial and general support staff. A vast majority of Fast Flights' employees are represented by Fair-Labour-For-All, a South African registered trade union that seeks to advance the interests of employees engaged in the aviation industry.

How will the claims of the Fast Flights staff, both pre-business rescue and during business rescue be treated in the business rescue plan, and a liquidation respectively?

Answer

Pre-Business Rescue Claims: Section 144(2) provides that to the extent that any unpaid remuneration, reimbursement for expenses of other amount of money relating to employment that became due prior to the commencement of business rescue, the employee is a preferred unsecured creditor of the company.

Post-Business Rescue Claims: to the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee, it is clear from section 135(1) that the employee in question will be a post commencement financier.

Liquidation: Employees with claims relating to their employment that were incurred during business rescue will be paid, having regard to the Diener judgments and section 135(3) and (4) of the Companies Act 2008, from the proceeds from the sale of the unencumbered assets, after payment of the costs of liquidation in terms of the Insolvency Act but before other statutory preferent claims.

However, insofar as pre-commencement claims relating to employment is concerned, employees will have a statutory preferent claim in terms of section 98A of the Insolvency Act.

Section 98A of the Insolvency Act - Payment of salaries or wages of former employees of the company, subject to the limits described in this section. It is worth pointing out that this section would only become applicable if salaries and wages became payable prior to the commencement of business rescue proceedings, failing which it will fall under section 135(3) of the Companies Act 2008, as described aforesaid.

Question 2

In terms of section 13 of the Labour Relations Act certain of Fast Flight's employees of Fair-Labour-For-All, a representative trade union, have authorised Fast Flights in writing to deduct subscriptions and levies payable to that trade union from their wages. However, before Fast Flights entered business rescue it withheld not only payments of PAYE to SARS, but also the subscriptions and levies to Fair-Labour-For-All.

How will the claims of SARS and Fair-Labour-For-All be treated in the business rescue plan, and a liquidation respectively?

Answer

Business Rescue: In case of *The Commissioner, South African Revenue Service v Beginsel NO 2013 (1) SA 307 (WCC)* the Court found that SARS is a concurrent creditor in a business rescue and enjoys no preferential status. Similarly, trade unions do not enjoy any preferential status in a business rescue for any pre-commencement claims that they may have. However, in this instance, the subscriptions and levies ought to be collected by the trade union from its members.

Liquidation: SARS would enjoy a statutory preference in terms of section 99 of the Insolvency Act. The trade union would, insofar as it is a creditor of the company, qualify as a concurrent creditor only.

Question 3

When Fast Flights expanded its operations in 2019 by acquiring an airline catering company and five aircraft, substantial financing was required. These assets, and others, were secured in favour of Fast Flight's financiers. However, these financiers are not willing to provide post-commencement financing in the course of Fast Flight's business rescue proceedings.

The business rescue practitioner intends to sell these assets. How will the claims of these financiers be treated in the business rescue plan?

Answer

A secured creditor, whether as a pre-commencement or post commencement financier, will enjoy the protection afforded by section 134(3) of the Companies Act 2008. That is, in order to dispose of the security, the business rescue practitioner would have to obtain the prior consent of the financiers, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness owed to the financiers. However, if the business rescue practitioner does not dispose of the security and the secured creditor's claim is either compromised in terms of section 154(1) or becomes unenforceable under section 154(2), the security may have to be released unless the business rescue plan provides otherwise.

Question 4

When Fast Flights entered business rescue, the aircraft lessors, claimed that the rental payments due for the continued possession and use of the aircrafts during the business rescue proceedings constitute post commencement finance. While the business rescue practitioners suspended the rental payments that would become due during business rescue proceedings for some of the aircraft, and negotiated reduced rentals with certain of the aircraft lessors for the continued use of some of the aircraft, the business rescue practitioners were unwilling to take a firm position in respect of others even though the aircraft were being flown.

How would the various categories of aircraft lessors' claims be treated in the business rescue plan?

Answer

Where rental payments have been suspended: The aircraft lessors will have a (concurrent) damages claim in terms of section 136(3), and if that claim is not compromised in terms of section 154(1) that claim will survive the business rescue proceedings.

Where reduced rentals were agreed and negotiated in business rescue: The aircraft lessors will have a post commencement claim against the company in terms of section 135(2) of the Companies Act 2008.

Where aircraft were being flown under pre-commencement agreements: In terms of the SAPOA judgment those creditors will be treated as concurrent creditors in the business rescue proceedings, and if that claim is not compromised in terms of section 154(1) that claim will survive the business rescue proceedings.

CHAPTER 6 - EFFECT ON BUSINESS RESCUE ON EMPLOYEES AND CONTRACTS**Self-Assessment Questions**

Where necessary, refer to the Case Study when answering the questions below.

Question 1

After investigating the affairs of Fast Flights, the business rescue practitioner ascertains that the various aircraft subject to instalment sale agreements are vital to the company's rescue process, but due to cash flow constraints cannot afford the monthly instalments. The business rescue practitioner elects to suspend Fast Flights' obligations relating to payment in terms of the instalment sale agreements for the period of the rescue. Is the business rescue practitioner entitled to do so if the instalment sale agreements were cancelled by the financial institution prior to the rescue procedure commencing? Provide reasons for your answer.

Answer

An instalment sale agreement provides that ownership of an asset will only transfer to the company on payment of the final instalment in relation to the assets that has been financed. Accordingly, prior to payment being made in full for the assets to the financial institution, the company is merely in legal possession of the assets and ownership remains vested with the financial institution until such time as payment has been made in full. The company is only in lawful possession of the assets in question if the agreement has not been cancelled by the financial institution due to a breach by the company. Section 133 of the Companies Act 2008 provides for a general moratorium on all legal proceedings and enforcement actions as against a company in business rescue, however such moratorium only applies to assets that are in the lawful possession of the company. A business rescue practitioner is empowered with the right to suspend the obligations of a company in rescue with regard to its contractual obligations either entirely, partially or conditionally, however this presupposes that the contract is still in place between the parties and that there is an obligation to be suspended by the business rescue practitioner. In the present set of circumstances not only has the contract been cancelled prior to business rescue, but the company is no longer in lawful possession of the assets subject to the instalment sale agreement. Accordingly, the business rescue practitioner will not be able to rely on the general moratorium and would further not be able to suspend the obligations in terms of the instalment sale agreement, as the company is not in lawful possession of the assets in question and the company shall have no right to retain such assets with ownership vesting in the financial institution. The assets in question would need to be returned to the financial institution and would not form part of the business rescue proceedings. Should the business rescue practitioner not comply, the financial institution would have their ordinary contractual and common law rights.

Question 2

Since Fast Flights is experiencing severe cashflow constraints, can the business rescue practitioner unilaterally reduce all staff salaries and wages to 50% of their contractual entitlement for the period of the business rescue in order to alleviate the cash flow constraints?

Answer

The rights of employees during a business rescue are of paramount and the Companies Act 2008 has entrenched the rights of employees during business rescue proceedings. A business rescue practitioner may not unilaterally amend or vary the terms of a contract of employment. An employee would retain all of his rights in terms of his contract of employment and any rights that may be conferred on that employee in terms of the Basic Conditions of Employment Act and the Labour relations Act. In order for the business rescue practitioner to reduce the staff salaries and wages to 50% of their contractual entitlement he would have to ascertain if there is a collective agreement in place with organised labour that would allow for such actions to be validly enforced through such collective agreement. However, in the absence of a collective agreement that provides for salary and wage costs, the only manner within which a business rescue practitioner can vary the obligations of the company to its salary and wage staff would be to do so by agreement between the parties. The business rescue practitioner may, post the publication of a business rescue plan, commence with a section 189 consultative process in terms of the Labour Relations Act and reduced payments to salary and wage staff may be tabled as an alternative to a potential retrenchment of such staff during the business rescue. Of importance is the fact that a section 189 process may not be commenced until such time as a proposed business rescue plan has been tabled by the business rescue practitioner to all affected persons. Should a business rescue practitioner unilaterally attempt to amend terms and conditions of employment of an employee during business rescue proceedings, the employee would be entitled to approach the Labour Court for relief.

Question 3

The business rescue practitioner of Fast Flights wishes to publish a proposed business rescue plan that includes a proposal for the sale of the business of the company to third party purchaser, as a going concern. It is the intention of the business rescue practitioner to sell the business out of the corporate entity and for the purchaser of the business to house it in a new corporate entity. However, the business rescue plan is silent on what effect the sale of the business would have on the employees of the company.

Do the employees of the company have any legal recourse in relation to the sale of the business and their ongoing employment? Select the correct answer from the list below:

- (a) No, the employees do not have any right of recourse and would remain employed by the company in rescue.**

- (b) No, the employees do not have any right of recourse and would have to approach the purchaser of the business in order to negotiate re-employment.
- (c) Yes, the employees have rights in terms of section 197 of the Labour Relations Act 1995 and their contracts of employment would be transferred to the purchaser by operation of law)
- (d) Yes, but the employees would be required to reach agreement with the purchaser of the business as to the terms and conditions of their employment and the transfer does not take place by operation of law.

Answer

The correct answer is (c).

CHAPTER 7 - THE EFFECT OF BUSINESS RESCUE ON SHAREHOLDERS AND DIRECTORS**Self-Assessment Questions**

Where necessary, refer to the Case Study when answering the questions below.

Question 1

What rights would the shareholders have to participate in Fast Flights' business rescue process?

Answer

The shareholders would be affected persons in the business rescue process and, as such, would be entitled to be notified of, participate in and object to the business rescue proceedings. They would be entitled to notice of, and the right to participate in any court proceedings and business rescue meetings. Mr Float would have to consult with them before preparing a business rescue plan for consideration and possible adoption. If that plan alters the shareholders' rights, they would be entitled to vote on the adoption of the plan.

If a business rescue plan has been rejected, and the business rescue practitioner does not (i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan, or (ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders (as the case may be), on the grounds that it was inappropriate, shareholders (and other affected parties) are entitled to call for a vote of approval from the holders of voting interests requiring the business rescue practitioner to prepare and publish a revised plan or apply to court to set aside the result of the vote on the basis that it was inappropriate.

Question 2

What should "consultation" entail? What can the shareholders do if Mr Float fails to consult properly with them?

Answer

The court in the case of *Hlumisa Investments Holdings (RF Limited and Another) v Van der Merwe NO and Others*, found that there is a clear distinction between "informing" and "consulting". With regard to "consulting", the court quoted, with approval, what Rogers J emphasised from various cases he considered in the matter of *Scalabrini Center Cape Town and Others v Minister of Home Affairs and Others*, as follows:

“...at a substantive level, consultation entails a genuine invitation to give advice and a genuine receipt of that advice;

consultation is not to be treated perfunctorily or as a mere formality. This mean inter alia that engagement after the decision-maker has already reached his decision or once his mind has already become “unduly fixed”, is not compatible with true consultation; and

that while at a procedural level consultation may be conducted in any appropriate manner determined by the decision-maker, the procedure must be one which enables consultation in the substantive sense to occur.”

Based on the above analysis, the court in *Hlumisa* found, *inter alia*, that informing creditors and shareholders of what was happening by way of Stock Exchange New Service announcements and in meetings with individual shareholders and a body of preferent shareholders, did not amount to “consultation”.

Mr Float is therefore obliged to engage properly with the shareholders, to hear their views and to take them into account before finalising the business rescue plan. If Mr Float publishes a plan and schedules a meeting to vote on that plan without proper consultation with the shareholders, they can go to court on an urgent basis to interdict the meeting pending proper consultation with them.

Question 3

Would Fast Flight's shareholders have any right to vote on its business rescue plan or on Mr Float's remuneration agreement?

Answer

Shareholders will have a right to vote on the business rescue plan if the plan alters the rights associated with their class of shareholding. The plan appears to be to retrench employee this would not entitle shareholders to a vote.

As Mr Float is earning remuneration in excess of the tariff rates, he would be obliged to enter into a remuneration agreement with Fast Flight. Shareholders would have a right to vote in favour or against his remuneration agreement, if they would be entitled to claim a portion of the residual value of the company on a winding up.

Question 4

What duties would Mr L Block and his fellow directors owe to Mr A Float?

Answer

Mr L Block and his fellow directors must continue to exercise their functions as directors, subject to the authority of Mr Float and they owe a duty to Fast Flight to exercise any management function in accordance with the instructions of Mr Float. If Mr L Block or one or more of the directors or the board purports to take any action on behalf of Fast Flight that requires the approval of Mr Float, that action is void unless approved by him.

Mr Block and his fellow directors have mandatory statutory duties to co-operate with and assist Mr Float and must (i) attend to his reasonable requests (ii) provide information about the company's affairs, and (iii) as soon as possible after the commencement of the business rescue proceedings, deliver to him all of the company's books and records that may be in their possession. They must also, within five business days of the commencement of the business rescue, provide him with a statement of affairs containing details of any material transactions involving the company or its assets occurring within the previous 12 months, any legal proceedings, assets, liabilities, income and disbursements, employees, debtors and creditors.

Question 5

In which circumstances could Mr A Float have Mr L Block removed as a director? Which, if any, powers and obligations would Mr Block and his fellow board members retain during the business rescue process?

Answer

Mr Float would be able to remove Mr Block by means of a court order, if he fails to comply with a requirement of Chapter 6 of the Companies Act 2008, or if he has impeded or is impeding him (Mr Float) in (i) the performance of his powers and functions, or (ii) the management of the company or (iii) the development or implementation of a business rescue plan.

Mr Float has full management control over Fast Flight in substitution for its board. While Mr Block and his fellow board members would remain directors, their powers are limited. They can do nothing of any significance without the authorisation of Mr Float.

Question 6

Would Mr Float be able to appoint a new director in Mr Block's place?

Answer

The Companies Act 2008 does not specifically empower Mr Float to appoint new directors. The appointment of directors is generally a matter for the shareholders of a company and it is submitted that this remains the position in Fast Flights' business rescue.

CHAPTER 8 - THE BUSINESS RESCUE PRACTITIONER**Self-Assessment Questions**

Where necessary, refer to the Case Study when answering the questions below.

Question 1

It was discovered that Mr V bad, unbeknown to the board, was found guilty in disciplinary proceedings brought against him by the professional body to which he belonged, with the result that his membership was revoked. On the basis that Mr V Bad was no longer a member in good standing of a legal, accounting or business management profession accredited by the CIPC, and as such, Mr V Bad was removed as the business rescue practitioner of Fast Flights and was replaced by Mr A Float, following certain court processes.

How, by whom and on what grounds, with reference to statute and case law, was Mr V Bad removed from his position as business rescue practitioner of Fast Flights? Who would have been entitled to replace Mr V Bad with Mr A Float?

Answer

Fast Flights entered business rescue voluntarily after passing a resolution by the board. While not explicitly stated in the case study it can be assumed that Mr V Bad was selected and appointed by the board of Fast Flight.

Section 138 (Qualifications of the practitioner) as amended and replaced by section 88 of Act 3/2011 deals with the qualifications a Business Rescue Practitioner must have in order to be appointed.

On discovery of the disciplinary proceeding against Mr V Bad the board could have confronted Mr V Bad and suggested that he resign as the Business Rescue Practitioner, failing which the directors of Fast Flight could apply to court for his removal in terms of section 139 (2)(d) on the basis that Mr V Bad no longer satisfies the requirements of section 138(1)(a).

The Act States:

"138. Qualifications of practitioners

- (1) A person may be appointed as the business rescue practitioner of a company only if the person-
- (a) is a member in good standing of a legal, accounting or business management profession accredited by the Commission [subject to regulation by a regulatory authority];"

Section 139 of the Companies Act States:

"139. Removal and replacement of practitioner

(1) A practitioner may be removed only-

- (a) by a court order in terms of section 130; or
- (b) as provided for in this section (2) Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds:

(2) Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds:

- (a) Incompetence or failure to perform the duties of a business rescue practitioner of the particular company;
- (b) failure to exercise the proper degree of care in the performance of the practitioner's functions;
- (c) engaging in illegal acts or conduct;
- (d) if the practitioner no longer satisfies the requirements set out in section 138(1);
- (e) conflict of interest or lack of independence; or
- (f) the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time."

Given that Mr V Bad was appointed by the board (and not court appointed) it would be up to the board to appoint his replacement. As such Mr A Float would have been appointed by the board on the termination of Mr V Bad as the Business Rescue Practitioner.

Question 2

Mr A Float requested Ms C Clerk to furnish him with a brief legal opinion, setting out the pertinent provisions of the Companies Act 2008 relating to the remuneration of business rescue practitioners, as he wanted to know whether the amounts he had been earning to date were in accordance with the Companies Act.

How will Mr A Float's remuneration be calculated and agreed? On what basis, with reference to case law, can Mr A Float agree a contingency fee, and with whom?

Answer

Mr A float may charge R2,000 per hour (including VAT) to a maximum of R25,000 per day as Fast Flights has a public interest score in excess of 500 and is therefore a large company.

There is no indication that a success fee has been agreed between the company and the business rescue practitioner. As such Mr A Float cannot charge any additional fees until such a fee has been agreed.

Mr A Float can recover costs incurred in performing his duties as a business rescue practitioner.

Provisions relating to business rescue practitioner fees:

The remuneration of the business rescue practitioner is based on the size of the company. Companies are ranked according to its public interest score as per regulation 127(2) and 26(2). The score is calculated using metrics of turnover, number of employees, shareholders and creditor values. A score under 100 is a small entity with a medium entity having a score between 100 and 500. A score above 500 is categorised as a large entity.

The tariffs a business rescue practitioner can charge are set out in the company Regulations of 2011, and have not been amended since.

A business rescue practitioner may also charge a success fee and may recoup costs incurred in performing his duties as a business rescue practitioner.

Once a business rescue practitioner has negotiated a success fee and/or an increase in the hourly rate from the gazetted rates to a market related rate, with the company, the business rescue practitioner can call a meeting in terms of section 143, to have their remuneration approved.

At this meeting, called in terms of section 143, the motion to approve a business rescue practitioner's negotiated success fee, the approvals must be granted by the majority of creditors and the majority of shareholders. Section 143 (2) of the Act states:

"Subject to subsection (4), an agreement contemplated in subsection (2) is final and binding on the company if it is approved by-

- (a) the holders of a majority of the creditors' voting interests, as determined in accordance with section 145(4) to (6), present and voting at a meeting called for the purpose of considering the proposed agreement; and
- (b) the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding-up, present and voting at a meeting called for the purpose of considering the proposed agreement."

"Subject to subsection (4)" refers to remedy a creditor has who voted against the proposal and wishes to take further action.

"A creditor or shareholder who voted against a proposal contemplated in this section may apply to a court within 10 business days after the date of voting on that proposal, for an order setting aside the agreement on the grounds that-

- (a) the agreement is not just and equitable; or
- (b) the remuneration provided for in the agreement is unreasonable having regard to the financial circumstances of the company."

Once the waiting period of 10 days has lapsed the success fee agreement is binding on the company.

Question 3

Mr A Float published a business rescue plan which was approved by the requisite majority of creditors' voting interests and proceeded to implement the business rescue plan. The business rescue proceedings of Fast Flights continued over a protracted period of time but, despite this, Mr A Float was of the view that it would be completely unnecessary to report on the progress of the business rescue proceedings, given that to do so would be very onerous.

With reference to case law and statute, and the standard of conduct expected of a business rescue practitioner, is Mr A Float's obligations in the business rescue of Fast Flights being fulfilled? You are also required to express a considered view on whether or not a court will likely order the removal of Mr A Float.

Answer

The Act requires that where a rescue takes longer than 3 months and the Business Rescue Practitioner must report on the status of the matter at the end of each month. Mr A Float is thus in breach of his obligations to report to affected persons in terms of section 132.

Section 132 (Duration of business rescue proceedings) subsection 3 states:

"If a company's business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner, may allow, the practitioner must-

- (a) prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and
- (b) deliver the report and each update in the prescribed manner to each affected person, and to the-
 - (i) court, if the proceedings have been the subject of a court order; or
 - (ii) Commission, in any other case."

Should an affected person wish to remove the practitioner they could rely on section 139 of the Act which states:

“(2) Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds:

- (a) Incompetence or failure to perform the duties of a business rescue practitioner of the particular company;
- (b) failure to exercise the proper degree of care in the performance of the practitioner’s functions;”

The failure to meet any of the criteria as stipulated in subsection 2 can’t in itself be relied upon to have a practitioner removed. In the case of *Knoop and Another NNO vs Gupta (No2)* the court held that it had the discretion to grant or refuse the removal of the practitioner. Proof of grounds for removal alone does not dictate removal and as such the individual circumstances of each case must be taken into account before an order is granted.

In the case of Mr A Float the court would need to look into the general approach Mr A Float took in handling the Business Rescue before making a decision. Mr A Float should be sending out an update report and as such these are grounds for removal.

Question 4

After the business rescue proceedings of Fast Flights had gone on for 18 months, it became apparent that Fast Flights was un-rescuable, despite the best efforts of Mr A Float and the board of directors. Consequently, Mr A Float began exploring the different avenues in terms of which the business rescue proceedings of Fast Flights could be terminated. He engages a firm of attorneys to explore ways in which to exit the business rescue process and to place Fast Flights into liquidation. The firm of attorneys furnish him with legal advice.

The board of Fast Flights does not, however, agree with the advice given to Mr A Float and demand from Mr A Float that he follows their instructions. What powers does Mr A Float have in the business rescue of Fast Flights, as compared with the powers of the board?

Answer

An alternate rescue is defined as structured wind-down of a company where the business can’t be rescued as a going concern. The premise that this structured wind-down would still give creditors a better return than liquidation must hold.

The business rescue practitioner, on deciding that the business can’t be rescued, must put the company into liquidation. In the case of Fast Flights the BUSINESS RESCUE PRACTITIONER would have to conclude that the “alternative” or “wind down” rescue will not provide a better return than liquidation of the Company.

Section 141 of the Act states:

“(2) If, at any time during business rescue proceedings, the practitioner concludes that-

(a) there is no reasonable prospect for the company to be rescued, the practitioner must-

- (i) so inform the court, the company, and all affected persons in the prescribed manner; and
- (ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;”

From the perspective of the practitioner this is his only option and as such must follow the Act that stipulates his duties and obligations.

The Board and Mr A Float have similar responsibilities to the company and both must act in its best interests. The board and Mr A Float may have differing opinions on whether the company can be rescued in accordance with the provisions of the company's act. The business rescue practitioner however has the added obligations and duties that are set out in Chapter 6 and as set out above must convert the proceedings to liquidation if he is of the view that the company cannot be rescued.

Section 140(3)(b) of the act provides that the office of the business rescue practitioner carries the same responsibilities, duties and liabilities of a director. This (as per section 76 of the Companies Act) includes that a director must look after the best interests of the company.

In *Knoop and Another NNO vs Gupta (No2)* the court held that a practitioner does not become a director but must act as if a director in behaving ethically and discharging his duties honestly. The court in *Van Den Heerden NO and Others v Van Tonder* held that a practitioner must also be held liable should they not perform their duties as required in S140 of the Act.

CHAPTER 9 - PARTICIPATION BY CREDITORS**Self-Assessment Questions**

Where necessary, refer to the Case Study when answering the questions below.

Question 1

Indicate whether the following statements are TRUE or FALSE. Furnish reasons for your answers.

Question 1.1

Mr A Float is required to convene the first meeting of creditors within 15 business days after his appointment as business rescue practitioner.

Answer

False. Mr A Float is required to convene and preside over the first meeting of creditors within 10 business days of his appointment as business rescue practitioner.

Question 1.2

At the first meeting of creditors, Mr A Float is required to inform the creditors whether he believes that there is a reasonable prospect of rescuing the company.

Answer

True.

Question 1.3

At the first meeting of creditors, a decision supported by the holders of at least 75% of the independent creditors' voting interests voting on a matter, is the decision of the meeting on that matter.

Answer

False. A decision on a matter at the first meeting of creditors only requires the support of a simple majority of the independent creditors' voting interests.

Question 1 4

Following the publication of the business rescue plan, the creditors of Fast Flights are entitled to be joined to any legal proceedings.

Answer

False. Where a business rescue plan has not yet been adopted, any legal proceedings seeking to set aside the business rescue process will have no effect on the creditors' pre-existing substantive rights. If the application succeeds, they simply retain their entitlement to claim what is owing to them, unaffected by the intervening business rescue proceedings. They will not be prejudiced by the setting aside of the business rescue proceedings as this will not affect their existing legal rights. Whilst creditors may well have an interest in litigation even before a business rescue plan is adopted, this does not necessarily translate to a legal interest in the outcome of the proceedings requiring their joinder.

Question 1.5

Due to the fact that Big Money Bank holds security for its loan facilities, its vote will carry more weight than creditors who do not hold security when it comes to voting for the adoption of a proposed business rescue plan.

Answer

False. Both a secured and unsecured creditor have a voting interest equal to the value of the amount owed to that creditor by the company.

Question 2

Prior to the adoption of the business rescue plan, Mr Fuel of Aero Gasoline Proprietary Limited, one of the major creditors of Fast Flights, wishes to make suggestions towards the business rescue plan. Which provision of the Companies Act 2008 can Mr Fuel rely on in this regard, and explain the operation of the provision?

Answer

Section 145(1)(d) of the Companies Act 2008 provides that each creditor is also entitled to participate informally in those proceedings by making proposals for a business rescue plan to the business rescue practitioner. Mr Fuel may approach Mr A Float with his proposals for the business rescue plan, should Mr A Float approve, the proposals can be incorporated into the business rescue plan. The business rescue plan is required to include a statement recording whether it includes a proposal made informally by a creditor.

Question 3

What is an “independent creditor” in terms of the business rescue provisions of the Companies Act 2008?

Answer

In terms of the Companies Act 2008, an independent creditor is defined as:

- a creditor of the company, including an employee of the company who is a creditor in terms of section 144(2); and
- not related to the company, a director, or the business rescue practitioner, subject to section 128(2) of the Companies Act 2008.

Section 128(2) provides that an employee is not related to a company purely by virtue of being a member of a trade union that holds securities of the company. It is also clear from the first part of the definition of “independent creditor” that an employee who is a creditor of the company is regarded as an independent creditor and is not excluded purely by virtue of being an employee.

Question 4

Section 145(3) of the Companies Act 2008 provides creditors with the entitlement to form a creditors’ committee. What are the functions and duties of the creditors’ committee and what are the requirements for membership in the creditors’ committee?

Answer

Section 149 of the Companies Act 2008 provides for the functions, duties and membership of the creditors’ committee. The functions and duties include the following:

- It may consult with the business rescue practitioner about any matter relating to the business rescue proceedings, but may not direct or instruct the business rescue practitioner;
- It may, on behalf of the general body of creditors, receive and consider reports relating to the business rescue proceedings; and
- It must act independently of the business rescue practitioner to ensure fair and unbiased representation of creditors’ interests.

The requirements for membership include that the person be:

- an independent creditor of the company;
- an agent, proxy or attorney of an independent creditor, or other person acting under a general power of attorney; or
- authorised in writing by an independent creditor to be a member.

CHAPTER 10 - THE BUSINESS RESCUE PLAN**Self-Assessment Questions**

Where necessary, please refer to the Case Study when answering the questions below.

Question 1

Section 150(2) of the Companies Act 2008 provides that a business rescue plan “must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan”. How many sections is the business rescue plan divided into and what is the prescribed minimum information that each part or each section in the business rescue plan must contain?

Answer

The business rescue plan is divided into the following 3 sections:

1. Part A - Background
2. Part B - Proposal
3. Part C - Assumptions and Conditions

Part A comprises the following background information:

- A complete list of all material assets of the company, as well as an indication as to which assets were held as security by creditors at commencement of the business rescue proceedings;
- A complete list of creditors of the company at the commencement date of the business rescue proceedings, as well as an indication as to which creditors would qualify as secured, preferent and concurrent in terms of the insolvency law;
- The probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;
- A complete list of the holders of the company’s issued securities;
- A copy of the written agreement concerning the business rescue practitioner’s remuneration;
- A statement as to whether (or not) the business rescue plan includes a proposal made informally by a creditor of the company.

Part B deals with the proposal section and includes *inter alia* the following:

- The nature and duration of any moratorium maintained in terms of the proposed business rescue plan;

- The extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;
- The ongoing role of the company, and the treatment of any existing agreements;
- The property of the company that is available to pay creditors' claims;
- The order of preference or payment waterfall in which the proceeds of the property will be applied to pay creditors, if the business rescue plan is adopted. In this regard it is noted that section 135 of the Companies Act 2008 provides that, to the extent that there are funds available in the waterfall for distribution to creditors, the distribution to creditors is made in the following order of priority while the company is under business rescue:
 - business rescue remuneration and expenses;
 - employees in respect of any remuneration, reimbursement for expenses or other amount relating to their employment during business rescue;
 - secured post commencement claims;
 - unsecured post commencement claims;
 - employees in respect of any claims for any remuneration prior to the commencement of business rescue proceedings; and
 - unsecured creditors (made up of preferent and concurrent creditors).
- The benefits of adopting the business rescue plan as opposed to consequences of liquidation;
- The effect that the business rescue plan will have on the holders of each class of the company's issued securities.

Part C deals with the assumptions and conditions upon which the business rescue plan will come into effect:

- The conditions that must be satisfied for the business rescue plan to come into operation and be fully implemented;
- The effect that the business rescue plan will have on employees and their terms and conditions of employment;
- Circumstances in which the proposed business rescue plan will end, for example in terms of section 132(2) of the Companies Act 2008;
- Projected balance sheet and statement of income and expenses, including financial forecasts for the ensuing three years;
- Section 150(3) of the Companies Act 2008 requires that the projected balance sheet and statement required in Part C of the business rescue plan:
 - must include a notice of any material assumptions on which the projections are based; and
 - may include alternative projections based on varying assumptions and contingencies.

Section 150(4) of the Companies Act 2008 requires that the proposed business rescue plan must also include a certificate signed by the business rescue practitioner stating that any actual information provided appears to be accurate, complete, and up to date, and the projections provided are estimates made in good faith on the basis of factual information and assumptions.

Question 2

The Companies Act requires the business rescue practitioner to appoint an independent consultant to calculate a probable liquidation dividend. What is the reason for including a liquidation calculation in the business rescue plan?

Answer

Section 150(2) of the Companies Act 2008 requires the business rescue plan to include an estimated/probable liquidation dividend that each creditor would receive if the company had been placed in liquidation as opposed to business rescue. It has become standard practice for business rescue practitioners to appoint independent restructuring experts to independently calculate the estimated or probable dividend that would be paid to creditors if the company had been placed in liquidation.

Question 3

For the business rescue plan to be approved or adopted, what is the requisite threshold for approval / adoption of the business rescue plan? What happens if the business rescue plan is not approved and is rejected by creditors? What are the options available to the business rescue practitioner?

Answer

For the business rescue plan of Fast Jet to be approved it must be supported by 75% of the creditors' voting interests who voted either by way of ballot form or proxy, and to the extent that independent creditors voted as part of the 75%, at least 50% of those independent creditors must have voted in favour of the business rescue plan.

The business rescue plan will then be deemed to have been finally adopted if it does not have the effect of altering the rights of the shareholders. In the event where the business rescue plan is adopted by the requisite number of creditors but does have the effect of altering the rights of the shareholders, then the business rescue practitioner must "immediately" hold a meeting with shareholders to present the business rescue plan to the shareholders for approval.

Question 4

- (a) Who is eligible to vote for the adoption of the business rescue plan?
- (b) Are employees allowed to vote for the adoption of the business rescue plan? Provide reasons for your answer.
- (c) If a creditor has a disputed claim, is he or she allowed to vote for or against the approval or adoption of the business rescue plan?
- (d) In practice, how are disputed claims normally resolved?

Answer

- (a) Employees and all creditors with valid claims will be entitled to vote at the meeting convened by Mr Float to consider the business rescue plan of Fast Jet. A creditor with a disputed claim will not be allowed to vote. Creditors with disputed claims will only be allowed to vote on the undisputed part / portion of the claim.
- (b) Yes, employees of Fast Jet have not been paid their salaries since the commencement of business rescue proceedings and are regarded as creditors in the business rescue proceedings of Fast Jet. As creditors, they are entitled to participate, like any other creditor, in the business rescue proceedings of Fast Jet, including voting for or against the adoption of the business rescue plan.
- (c) A creditor with a disputed claim will not be allowed to vote. Creditors with disputed claims will only be allowed to vote on the undisputed part / portion of the claim.
- (d) It has become standard practice by experienced business rescue practitioners to include or incorporate a dispute resolution mechanism when drafting the business rescue plan. As an experienced business rescue practitioner, Mr Float would have incorporated a dispute resolution mechanism and any disputed claim will be resolved in terms of the dispute resolution mechanism in the business rescue plan once it is adopted.

Question 5

What happens if the business rescue plan is approved by the requisite majority of creditors and Jumbo Jet has voted against the business rescue plan? Is the approved business rescue plan binding on Jumbo Jet?

Answer

Section 152(4) of the Companies Act 2008 provides that once a business rescue plan is adopted, it is binding on the company and on each of the creditors of the company and every holder of the company's securities, whether or not such a person was present at the meeting, voted for or against the adoption of the business rescue plan or in the case of creditors, or had proven their claims against the company.

Section 154(2) provides that if a business rescue plan is approved and implemented in accordance with the Companies Act 2008, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process except to the extent provided for in the plan.

Question 6

Fast Flights' aircraft lessors are all foreign companies domiciled outside of South Africa. One of these lessors is owed a substantial amount of money by Fast Flights for rental periods prior to the commencement of business rescue, under a lease agreement that states its governing law to be that of the foreign lessor's country of domicile. The foreign lessor (creditor) is of the opinion that the statutory moratorium imposed as part of Fast Flights' business rescue proceedings does not apply to it because it is not a South African company / creditor and because its lease agreement with Fast Flights is not governed by South African law. Thus, it is insisting that Fast Flights either settle its debt in full, or return the leased aircraft. Note that Fast Flights is up to date with rental payments relating to periods post the commencement of its business rescue proceedings; Fast Flights would like to continue leasing the aircraft in question for the foreseeable future.

Question 6.1

Briefly provide your opinion on the validity of the foreign lessor's (creditor's) viewpoint? What other considerations should Mr A Float (the business rescue practitioner) be aware of in terms of this (and other) foreign creditor(s).

Answer

It may be that the governing law of Fast Flights' agreement with the foreign lessor is that of the foreign lessor's country of domicile. However, to enforce any payment from Fast Flights, the foreign lessor would have to approach the South African courts. This would not be permitted under section 133(1) of the Companies Act 2008 - the moratorium is general in nature and applies to all legal proceedings brought against Fast Flights (in South Africa), irrespective of whether those proceedings are brought by a foreign person / entity.

The foreign lessor would therefore not be able to bring any enforcement action against Fast Flights for recovery of unpaid rental amounts, except under those specific conditions applicable to section 133(1)(a-f). Furthermore, the foreign lessor would not be able to enforce the return of the leased aircraft since Fast Flights is lawfully in possession of such aircraft.

With that said, further considerations for Mr A Float may be:

- Does the foreign lessor owe Fast Flights any monies in other areas of its business? If so, the foreign lessor may be able to apply set-off in recovery of its claims for unpaid aircraft rentals.
- Does Fast Flights have any assets currently located in the foreign lessor's domicile? If so, these assets may be at risk of being attached under the courts of the foreign lessor's domicile.

Question 6.2

Draft a section for inclusion in the business rescue plan that deals with the binding nature of the business rescue plan once adopted, while making reference also to foreign domiciled creditors.

Answer

Binding nature of this business rescue plan

The attention of affected persons is drawn to the provisions of section 152(4) of the Companies Act 2008. This section provides that once a business rescue plan has been adopted, it is binding on Fast Flights, its creditors (including all claims, whether accepted by the business rescue practitioner as creditors, whether foreign or local creditors, whether disputed creditors, conditional claims and / or prospective claims) and every holder of the Fast Flights' securities, whether or not such a person:

- was present at the meeting to determine the future of Fast Flights;
- voted in favour of the adoption of the business rescue plan; or
- in the case of creditors, had proven a claim against Fast Flights.

Question 7

The airline catering company that Fast Flights acquired prior to 2019 operates as a wholly owned subsidiary of Fast Flights. While the catering company has strong future prospects and is expected to be profitable in the long-term, it will require a significant amount of funding for the initial 12 to 18 months of Fast Flights' business rescue proceedings to cover working capital shortfalls (that is, the catering company subsidiary will require short to medium-term financial assistance from Fast Flights). Thereafter, the catering company is expected to provide substantial returns to Fast Flights, which should ultimately improve creditor dividends.

Question 7.1

Given Fast Flights' current financial distress (business rescue), comment on whether you believe Fast Flights is permitted to provide financial assistance to its catering company subsidiary in terms of section 45 of the Companies Act 2008?

Answer

Section 45 of the Companies Act 2008 stipulates that a company (Fast Flights) may provide financial assistance to a related or inter-related company (the catering company subsidiary) as long as:

- The company's Memorandum of Incorporation (MOI) allows for such;
- The company has a shareholder's resolution (not older than two years) authorising such financial assistance;
- The company's board (or in this case, Mr A Float as the business rescue practitioner) is satisfied that the company would satisfy the solvency and liquidity tests immediately after providing such financial assistance; and
- The terms and conditions of such financial assistance are fair and reasonable to the company.

Assuming that there is an existing shareholder resolution authorising the provision of financial assistance and that Fast Flights' MOI does not prohibit it, the main stumbling block then relates to the solvency and liquidity test (which is an obvious problem given Fast Flights' business rescue proceedings), and whether the terms of the financial assistance are fair and reasonable to Fast Flights.

Assuming that Fast Flights is able to raise enough post-commencement finance to provide the required financial assistance to the catering company subsidiary and still fund the remainder of the business rescue proceedings, it could be argued that the liquidity test has been satisfied. Regarding the solvency test, it could be argued that the provision of financial assistance does not make Fast Flights any more insolvent than it already is, provided the required additional post-commencement finance can be raised and provided the expected return to Fast Flights, as a result of the provision of such financial assistance, will be net positive (for example, Fast Flights is already insolvent, but the provision of financial assistance will not further worsen Fast Flights' solvency position).

It is clear from the question that the returns to Fast Flights, stemming from the provision of such financial assistance, are expected to be (substantially) net positive, and thus, the terms and conditions of such financial assistance can be seen to be fair and reasonable to Fast Flights.

In conclusion, the above question is particularly complex (and grey), but it could be argued that the provision of financial assistance by Fast Flights to its catering company subsidiary would be permitted under s 45 (under the above assumptions).

Question 7.2

Draft a section for inclusion into the business rescue plan that deals with Fast Flights' subsidiary catering company and the provision of financial assistance by Fast Flights to cover its 12 to 18 month working capital shortfall.

Answer

With the requisite support of post commencement financiers, Fast Flights will provide direct or indirect financial assistance to its subsidiary catering company, which financial assistance may include without limitation the provision of loans, the issuance of guarantees, and / or the subordination of claims owing to Fast Flights by the subsidiary.

Question 8

Big Money Bank expressed its concern about the status of the facilities made available by it prior to the commencement of business rescue proceedings, and whether such facilities would be treated differently than any new facilities provided during the business rescue proceedings. Comment on whether you believe that Mr A Float can address Big Money Bank's concerns by reflecting the unutilised portion of the bank facility at the commencement of business rescue as post-commencement finance in the business rescue plan, if fully utilised post-business rescue.

Answer

The business rescue practitioner can alleviate the concerns of Big Money Bank by acknowledging in writing that all undrawn amounts in the current banking facility will be considered as post commencement financing as per section 135 (2) of the Companies Act 2008. Furthermore, the business rescue practitioner could point that in accordance with section 135(3)b of the Companies Act, the post commencement finance claim will have preference in the order in which it was incurred over all the unsecured claims against the company. Being that the shareholders and other lenders at that point had not provided any post commencement finance, Big Money Bank's claim would be repaid in preference to all other post-commencement finance claims in terms of section 135(2)a.

Question 9

Considering Mr A Float's discussions with the lenders and shareholders of Fast Flights is it fair to state that all post-commencement finance is considered as equal in these business rescue proceedings?

Answer

Not all post-commencement finance is treated equal. In accordance with section 135, post-commencement finance can be divided into two categories, the first being (i) any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee or (ii) any financing obtained by the company other than as contemplated in (i) above.

- The post-commencement finance claim for employees as noted in (i) above will be repaid in preference to the post-commencement finance received as noted in (ii) above;
- Furthermore, in regard to post-commencement finance received as noted in (ii) above, the post-commencement finance claims will have preference in the order in which they were incurred over all unsecured claims against the company.

Question 10

Mr A Float published the Fast Flights business rescue plan on 1 August 2020. With reference to the provisions set out in section 150 of the Companies Act 2008:

Question 10.1

Explain why this stated date of publication is problematic in terms of the statutory requirements and legal factors associated with the publication of a company's business rescue plan.

Answer

Due to the case study not providing any information regarding the business rescue practitioner's request for an extension for the publication date of the plan, the stated date of publication is problematic as it is more than 25 business days after the business rescue practitioner's appointment, which contravenes the legal provisions in section 150, regarding the statutory timing requirements of a business rescue plan's date of publication.

Question 10.2

Offer a solution that details the process that Mr A Float could have undertaken, in order to negate any legal challenges in this regard.

Answer

Section 150(5) of the Companies Act 2008 provides that “the business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by– (a) the court, on application by the company; or (b) the holders of a majority of the creditors’ voting interests. Fast Flights business rescue practitioner could have avoided any legal ramifications regarding the publication date of the plan if he had utilised one of the above methods to request and obtain an extension to the publication date of the business rescue plan. The simplest manner in which to do this is to request an extension from the creditors. If this request is not supported by the requisite majority of creditors, then the company could apply to the court for the required extension.

Question 11

The commencement of a section 189(3) large-scale retrenchment process is one of the primary ways in which a financially distressed company in business rescue can reduce overhead costs and operating expenditure. Accordingly, if determined as necessary, commencing this process as soon as possible after the commencement of business rescue proceedings would be of significant benefit to any company that has commenced business rescue. When Mr A Float began preparing and drafting Fast Flights’ business rescue plan, he included provisions that contemplated the retrenchment of a large portion of Fast Flights’ employees. With reference to the applicable sections of the Companies Act 2008 and relevant case law, explain the following:

Question 11.1

Soon after his appointment, Mr A Float determined that a reduction in Fast Flights’ employee headcount would significantly assist the company in its cost-reduction initiatives. Why then did Mr A Float only consider such a critical cost-saving initiative in the business rescue plan and not as a part of his immediate cost-reduction initiatives?

Answer

In the matter *SA Airways (SOC) Ltd (In Business Rescue) (“SAA”) and Others v National Union of Metalworkers of SA (“NUMSA”) on behalf of Members and Others* (2020), the Labour Court upheld an urgent application by NUMSA and the SA Cabin Crew Association (the Unions) against SAA and the business rescue practitioners, and ordered that it was procedurally unfair to retrench employees before a business rescue plan contemplating such retrenchments was published and adopted. Thus, the Fast Flight business rescue practitioner did not commence a section 189 large-scale retrenchment process prior to the publication of the business rescue plan. This judgment set a precedent that retrenchments in business rescue cannot be contemplated or commenced, unless provided for in a company’s business rescue plan that is duly approved and adopted.

Question 11.2

With reference to your response to question 11.1 above, discuss the problematic aspects that this determines in the context of business rescue. Ensure that your answer critically examines the failings of the relevant case law in terms of the precedent set regarding the treatment of employees in a business rescue process.

Answer

In order to sufficiently answer this question, one must first understand the argument put forward by NUMSA. In essence, their argument was that section 136(1)(b) of the Companies Act 2008 only empowers the SAA business rescue practitioners to commence with and effect retrenchments if such retrenchments were "contemplated in the company's business rescue plan". Since the SAA business rescue plan had not yet been published or adopted, any attempt to retrench employees was found to be in breach of section 136(1)(b) of the Act.

The Labour Court considered the matter from the vantage point of the Constitutional right to fair labour practices, which is embodied in the Labour Relations Act. The Labour Court reasoned that if there was an interpretation of section 136(1)(b) that better promotes the preservation of jobs and job security, then that interpretation ought to be preferred. Although this is a laudable ideal, I think that is not sound legal reasoning. The real question should be whether section 136(1)(b) could be interpreted in line with the Labour Relations Act and if not, whether a limitation of the Constitutional protections were reasonable - an inquiry which the Labour Court did not make.

The SAA business rescue practitioners have full managerial control of SAA in substitution of its board of directors and pre-existing management, and this is in addition to any powers given to them in terms of section 140(1)(a) of the Companies Act 2008, a fact that was not considered by the Labour Court. As such, unless the Companies Act expressly provided to the contrary, the SAA business rescue practitioners could, just like the SAA board of directors, commence and implement retrenchments provided that they comply with the Labour Relations Act when doing so.

In our view, section 136(1)(b) does no more than to state the obvious. Since an adopted business rescue plan is binding on all affected persons, section 136(1)(b) simply ensures that the adopted business rescue plan does not give the company the right to retrench employees without following the procedures set out in the Labour Relations Act. In other words, it merely reaffirms the right to fair retrenchments and, in this regard, limits what the business rescue plan can achieve. It does not create a moratorium on retrenchments before the business rescue plan is published and adopted.

In addition, the Labour Court confirmed that nothing prevents a business rescue practitioner from offering voluntary severance packages to avoid retrenchment before the business rescue plan is published. This does not make sense because, in the context of business rescue, the mere fact that voluntary severance packages have been offered (as an alternative to retrenchment) is indicative that retrenchments were already contemplated (but outside of a published and adopted business rescue plan).

The interpretation of section 136(1)(b) does not properly balance the interest of all stakeholders in the business rescue process and in fact may well prejudice the rights of employees to participate in meaningful consultations with a view to finding alternatives to their retrenchment (as the delay in doing so may overtake the available options).

Essentially, employees are still protected against unfair retrenchments, but such protection does not equate to a moratorium against retrenchments until the business rescue plan (expressly including retrenchments) is adopted – I am of the view that this is incorrect.

It is by no means an overstatement to say that the *NUMSA v SAA* judgment, will render the majority of business rescues unlikely to succeed as the ability for a business rescue practitioner to implement critical cost-cutting measures such as retrenchments, is eliminated.

*Answer adapted from “COVID-19 - *NUMSA v SAA* - The death knell to successful business rescue?” – Article by Hogan Lovells.

Question 11.3

It is noted that Mr A Float’s business rescue plan did not specify the status of the employees’ unpaid salaries. With reference to the applicable provisions of the Companies Act 2008, explain why this is extremely problematic and how employees claims should be treated in a business rescue and dealt with in a business rescue plan.

Answer

In terms of section 150(2)(c)(ii), the effect business rescue will have on employees is a matter the business rescue practitioner must include in the business rescue plan. The business rescue plan must outline the anticipated effect on employees’ employment status as well as their conditions of employment and ongoing provision of service. If the company owes the employee any monies and such amount became due before business rescue proceedings commenced, then section 144 (2) stipulates that the employee is a preferred unsecured creditor of the business for the amount owed. In such a case the employee will be paid before unsecured creditors are paid.

Question 12

Under what conditions will employee costs sit above post-commencement finance in the waterfall of payments in business rescue?

Answer

In accordance with section 135(1) of the Companies Act 2008, to the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee the money is regarded to be post-commencement financing; and will be paid in the order of preference set out below:

- The practitioner's remuneration and expenses, and other claims arising out of the costs of the business rescue proceedings;
- Any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings;
- Post commencement financiers (where credit was "obtained", for example, negotiated);
- Concurrent creditors (pre- commencement, and post-commencement if services rendered under a pre-commencement agreement and credit not negotiated).

Question 13

Considering the totality of Fast Flights' creditors, comment on the manner in which an approval of voting on the business rescue plan can be achieved. You are required to specifically comment on relevant considerations pertaining to related-party and subordinated creditors.

Answer

In accordance with section 152 of the Companies Act 2008, a vote by holders of more than 75% of the creditors voting interests who voted is required and, of those votes in support of the plan, this must include at least 50% of the independent creditors voting interests, if any, that voted. Total creditors in this instance amounts to R10bn (consisting of R4bn secured creditors, R4bn unsecured creditors and a further R2bn inter-company claim). Assuming that all creditors vote, R7.5bn of votes in favour of the plan is required (of which at least 50% should be independent). The catering company claim would not be considered to be independent, given that Fast Flights is its holding company, however this should not be an issue in this scenario as long as its claim does not represent more than 50% of voting interests. The catering company claim is subordinated in favour of secured creditors - this should be assessed in line with section 145(3)(b) which requires such voting interest to equal to a liquidation claim value which should be independently ascertained.

Question 14

In relation to the Fast Flights business rescue practitioners' remuneration, what additional disclosure in the business rescue plan is required in terms of the Companies Act 2008?

Answer

Where a business rescue practitioners' remuneration exceeds the rates outlined in the tariff, such arrangement requires a remuneration agreement to be entered into between the company and the business rescue practitioner. Such an agreement should furthermore be voted on and approved by creditors and shareholders ahead of the publication of the business rescue plan. Finally, a copy of the written agreement concerning the business rescue practitioners' remuneration should be disclosed in the business rescue plan.

Question 15

Jumbo Jet Proprietary Limited, a minority creditor, voted against the plan on the basis that it genuinely believed that the plan would impose financial risks on itself as well as other creditors, and as a result was of the view that it was not bound by the terms of the approved business rescue plan at all. Fully discuss and substantiate the legal principles applicable to the above statement, indicating whether they are valid and supported by the applicable law.

Answer

Student must address the following points:

- Section 153(1) requires that: the business rescue practitioner must either request a vote from all holders of voting interests for the business rescue practitioner to prepare and publish a revised business rescue plan; or advise the meeting that the company will apply to the courts to set aside the votes of vote holders who rejected the business rescue plan (creditors and / or shareholders), on the grounds that their vote was inappropriate;
- *Shoprite Checkers (Pty) Ltd v Berryplum Retailers CC*. The court stated that a vote cast by a creditor in good faith based on a genuine belief that a vote against the plan would advance that creditor's interests, cannot be regarded as "unsuitable, unfitting or improper" which is what "inappropriate" means as used in section 153(1). The court did not believe that the purposes of the Act would be advanced by imposing financial risks on business people which they honestly regard as unwise;

- A similar view was expressed in *JVJ Logistics (Pty) Ltd v Standard Bank of South Africa Ltd* 2016 (6) SA 448 (KZD) where the court stated that the creditor's vote against the plan could not be regarded as inappropriate where the plan "...would have the effect of placing almost all of the risks with regard to the business venture, ..." on the creditor. The court could not compel a creditor to submit to risks and infringements of its rights or force the creditor to fund the rescue against its will.
- *FirstRand Bank Ltd v KJ Foods CC* 2017 (5) SA 40 (SCA). Here it was held that the test whether a vote was inappropriate and whether it would be just and equitable to set it aside, should be completely objective and take into consideration the interests of all the creditors and the employees of the company. Once the opposing votes have been set aside, the plan is regarded as approved and no further meeting to vote on the plan is required.
- Since Jumbo Jet is a minority creditor, their vote has no significant value, and the plan will still be adopted regardless of their vote. It is therefore not necessary to set aside the vote of Jumbo Jet for the plan to be approved;
- According to section 152(4), a business rescue plan that has been adopted is binding on the company, all of its creditors and its shareholders whether or not that person was present at the meeting, voted in favour of the meeting or if that person was a creditor, proved their claim and quantum of such claim.

Question 16

Consider the offer made by Engines Proprietary Limited to Jumbo Jet Proprietary Limited. Discuss the implications on both parties. Substantiate your answers by specific reference to all applicable and relevant sources.

Answer

Student must address the following points:

- Section 153(1)(b)(ii) provides that one or more affected persons may make a "binding offer" to purchase the voting interests of any of the persons who opposed adoption of the plan, at a value determined independently and expertly as the fair and reasonable estimate of what such person would receive if the company were to be liquidated. This valuation is subject to review by the court on application by the holder of the vote or the person acquiring it (section 153(6)). For this option it is not required that the affected person should have been present at the meeting. If such an offer is made, the meeting must be adjourned for no more than five business days to allow the practitioner time to amend the plan to reflect the results of the offer (section 153(4));

- In *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* [2013] 4 All SA 432 (GNP), the court held that the offer was not only binding on the offeror, but also the offeree. In effect this meant that the offeree could not refuse the offer. The resulting argument that this would then be unconstitutional because it deprived the affected person of his or her property (for example was an act of expropriation), was rejected by the court because, so the court argued, it was not an arbitrary deprivation of property as prohibited by section 25(1) of the Constitution;
- However, in *DH Brothers Industries (Pty) Ltd v Gribnitz NO* 2014 (1) SA 103 (KZP) the opposite was held. The court stated that the offer was binding only on the offeror and could thus not be retracted, but could be rejected by the offeree. You are urged to read both these judgments in full because they also touch on various other important aspects.
- The SCA had to end the uncertainty. In *African Banking Corporation of Botswana Ltd v Kariba Furniture Manufacturers (Pty) Ltd* 2015 (2) SA 192 (SCA) the judgment of the court a quo was overturned, and it was held that the binding offer bound the offeror once the offer had been made but the offeree was only bound after accepting the offer.

CHAPTER 11 - UNDERSTANDING FINANCIAL FORECASTS IN A BUSINESS RESCUE CONTEXT**Self-Assessment Questions**

Where necessary, please refer to the Case Study when answering the questions below.

Question 1

Section 150(2)(c)(iv) of the Companies Act 2008 requires only a projected balance sheet for the company and income statement for the ensuing three years. Briefly discuss this requirement and what can be done from a “best practice” perspective to enhance the information available to affected persons.

Answer

The Companies Act 2008 does not require a projected balance sheet – only a projected income statement for the ensuing three years. There is no requirement to produce a cash flow forecast, although cash flow is considered to be a critical component to ensure that Fast Flights is generating sufficient cash to implement its business rescue proposal and make payment in accordance with its plan.

Question 2

Section 150(3)(a) of the Companies Act 2008 requires that a “notice” of any material assumptions on which the projections are based must be included. In terms of Fast Flights, list five assumptions that you believe will be material to the affected persons in understanding the financial projections.

Answer

- Catering revenue projections
- Flight revenue projections
 - Revenue per route
 - Number of routes
 - Average ticket price
- Euro exchange rate assumptions
- Average ticket price
- Employee information
 - Retrenchment costs
 - Ongoing annual wage

- Significant input costs
 - Assumptions regarding cost of fuel and associated exchange rate
 - Regulatory costs
 - Maintenance of (restructured) fleet

Question 3

Section 150(3)(b) of the Companies Act 2008 states that alternative projections may be included based on varying assumptions and contingencies. In the context of Fast Flights, discuss a situation where this may be applicable and how you would incorporate the alternative projections into the business rescue proposal.

Answer

Part of the business rescue proposal may include an amendment to the flown routes. It may be the case that one scenario would look at as-is routes and the resultant financial consequence, compared with a restructured route network and the financial consequence.

Out-source maintenance vs maintenance in-house.

Sell catering business / cease catering / continue catering.

[Anything commercial would be accepted].

Question 4

What, in your opinion, is the purpose of including a balance sheet and income statements in the business rescue proposal?

Answer

The financial statements, in certain circumstances, form the basis of reliance on which future dividends will be paid to creditors. The forecasts are also required to assess solvency of the business, which is the precursor to substantial implementation.

Question 5

Who are the stakeholders / audience of the financial statements and what are they most interested in seeing in these financial forecasts?

Answer

- Affected persons:
 - Employees – interested in the extent of their continued employment, potential timing of any retrenchment and retrenchment package;
 - Shareholders – whether any value remains or accrues to them as a result of the business rescue process;
 - Creditors – the potential likelihood of a dividend and timing thereof;
 - Trade unions – as per employees;
 - Regulatory – ensuring that the proposal is viable to ensure continued trading / licencing.

Question 6 (this question is a variation on Question 1)

In terms of section 150(2)(c)(iv) of the Companies Act 2008 no cash flow forecast is required by the Companies Act. In your opinion, describe the importance of the cash flow forecast and how this could enhance an affected person / reader's understanding of the situation?

Answer

- The cash flow forecast provides clarity on the future cash flows of the business – this is especially important where the profits of a business are materially different to cash flow;
- If the business rescue plan requires the payment of dividends, it is important to determine that sufficient cash flow is being generated to make these payments and what potential risks to the cash flows may be;
- Provides comfort on commercial solvency for creditors;
- Discloses key sources of finance. Cash generation may be key to retain key suppliers etcetera, post exit of the business rescue

CHAPTER 12 - THE PSYCHOLOGY OF BUSINESS RESCUE**Self-Assessment Questions for Chapter 12**

The author / lecturer for this Chapter has indicated that guideline answers are not able to be given for this section of the work, as the test for candidates is having read the section on the psychology of business rescue to then apply some of the techniques, learnings and their own instinct on how to persuade and problem solve with the various stakeholder groups below. Candidates must think of the leverage (and consequences of exercising such) and how they might seek to coral or divide and conquer and a range of other techniques to influence desired outcomes.

Question 1

If significant numbers of Fast Flight's customers who have paid in advance for flights were acutely worried that they will lose their money if the company fails, how could the business rescue practitioner and team firstly pre-empt this and secondly manage customers to reduce such a cash outflow risk?

Question 2

Given the heavy staff complement (especially with extra growth in numbers pre-business rescue) how could the business rescue practitioner seek to manage and mitigate risk without promising what cannot necessarily be controlled in terms of a need to retrench?

Question 3

Following the acquisition of new aircraft through secured lending from Big Money Bank, how might the business rescue practitioner seek to persuade the bank not to place excessive pressure on them to immediately return all of these aircraft?

CHAPTER 13 - THE DISCHARGE OF DEBTS AND CLAIMS**Self-Assessment Questions**

Where necessary, please refer to the Case Study when answering the questions below.

Question 1

Answer the statement below by stating whether it is TRUE or FALSE. Provide reasons for your answer.

The business rescue plan will not be binding on Big Money Bank as the existing fleet of 15 aircraft have been registered as security in their favour for the loan facilities provided to Fast Flights.

Answer

False. The types of creditors bound by the business rescue plan, for example, secured and unsecured creditors.

Question 2

Advise Jumbo Jet Proprietary Limited on what their legal position is as a minority creditor.

Answer

- (i) whether the business rescue plan applies to dissenting creditors (it does);
- (ii) the rights of dissenting creditors to enforce their claims against the company.

Question 3

What is the "requisite majority" of creditors that need to approve a business rescue plan?

Answer

Section 152(2) of the Companies Act 2008 - explain the meaning of the requisite majority (for example that in a vote called in terms of subsection (1)(e), the proposed business rescue plan will be approved on a preliminary basis if it was supported by the holders of more than 75% of the creditors' voting interests that voted; and the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that voted.

Question 4

What is the benefit of the fresh start principle as it applies to Fast Flights? Do you think that Fast Flights can have a fresh start in these circumstances?

Answer

- (i) The meaning of the fresh start principle and/or its origins;
- (ii) Whether the principle applies to Fast Flights;
- (iii) Whether Fast Flights can truly have a fresh start (student's own opinion).

Question 5

It is clear that certain creditors have taken matters into their own hands pursuant to Fast Flights' failure to make payment of the amounts owed to them. What is the purpose of the general moratorium on creditors in business rescue proceedings and does this moratorium apply to the creditors in question?

Answer

- (i) The meaning of the general moratorium on creditors;
- (ii) Confirmation that the general moratorium on creditors will apply to the creditors in the case study;
- (iii) A comprehensive list of creditors to whom this moratorium applies.

Question 6

Set out the position of Mr B Sky in so far as he bound himself as surety for Fast Flights' debts. Are Mr B Sky's obligations relinquished pursuant to the commencement of Fast Flights' business rescue proceedings as he suggests?

Answer

- (i) The legal position on sureties, with specific reference to the fact that their obligations are accessory to the obligations of the company;
- (ii) Confirmation that the legal position above applies to Mr B Sky;
- (iii) An explanation of what the accessory nature referred to above means in relation to Mr B Sky's obligations.

CHAPTER 14 - AREAS WHERE INSOLVENCY LAW AND BUSINESS RESCUE OVERLAP**Self-Assessment Questions**

Where necessary, please refer to the Case Study when answering the questions below.

Question 1

Was Mr A Float correct in deciding to investigate routes to exit business rescue proceedings?

Answer

Yes, in terms of section 141(2)(a)(ii), if, at any time during business rescue proceedings, the business rescue practitioner concludes that there is no reasonable prospect for the company to be rescued, the business rescue practitioner *must* apply to court for an order discontinuing business rescue proceedings and placing the company into liquidation. (In terms of section 141(2)(a)(i), the business rescue practitioner is also required to inform the court, the company, and all affected persons in the prescribed manner that there is no longer a reasonable prospect of rescue.)

Question 2

On what basis would business rescue proceedings in this context be terminated, and what would this involve?

Answer

They would be terminated on the basis of the above, and application would be made to court to convert the business rescue proceedings to liquidation proceedings.

Question 3

Would there be any potential advantage to this course of action over remaining under business rescue?

Answer

If there is any suspicion of misconduct that the business rescue practitioner is not able to uncover, there may be advantages to having a liquidator who will be able to make use of his more extensive investigative powers.

Question 4**What would be possible disadvantages be?****Answer**

Liquidation means the “death” of the company, and its business. Not only will the company’s business partners lose out on its future business, but employees of the company would be without the protection offered by business rescue under chapter 6.

CHAPTER 15 - SECTION 155 COMPROMISES WITH CREDITORS**Self-Assessment Questions****Question 1**

Can a company achieve a scheme of arrangement between its shareholders utilising the provisions of section 155 of the Companies Act 2008?

Answer

No, section 155 of the Companies Act 2008 governs compromises between a company and its creditors. Schemes of arrangement were governed by section 311 of the Companies Act 61 of 1973 and are governed by section 114 of the Companies Act 2008.

Question 2

Are the provisions of section 155 available to an affected party in business rescue, or to a business rescue practitioner?

Answer

No, per section 155(1), section 155 does not apply to a company engaged in business rescue.

Question 3

If a company has a number of different creditors with different rankings, can the company's directors or liquidator compromise only one such category of creditors to the exclusion of all others (that is, can preferent creditors be compromised under section 155 without compromising the rights and claims of the secured and concurrent creditors)?

Answer

Yes. Per section 155 2(a), the board of a company, or the liquidator of such company may propose a compromise to either every creditor of the company, or every member of the relevant class of creditors whose name or address is known to, or can reasonably be obtained by, the company.

Question 4

How does one determine the various classes of creditors for the purposes of voting on a section 155 offer?

Answer:

The classes of creditors are identified initially in the Insolvency Act (for example, secured creditors, preferent creditors and concurrent creditors). In a section 155 compromise, classes of creditors are determined according to their rights and interests.

Question 5

Would an offeror or a receiver be acting in contempt of court if, after an offer of compromise has been sanctioned by court order, they are unable to pay creditors in accordance with the terms and conditions of the sanctioned compromise?

Answer

No, the offeror or receiver would not be acting in contempt of Court. Authorities have stated that the sanctioning of a compromise does not mean its terms become an order of Court. The sanctioned compromise is a contract which derives its binding force from the fact that it was approved by the Court in terms of a statute (see *inter alia*: *Ex parte De Wet NO; In re Mackville Motors (Pty) Ltd (in liquidation)* 1971 (1) SA 256 (W), *Cohen NO v Nel and Another* 1975 (3) SA 963 (W) and *Buechel v Graf* 2001 JDR 0706 (C)).

Question 5

If a creditor voted in favour of a scheme of arrangement, is it thereafter necessary to serve upon such creditor the application to the court to sanction the compromise?

Answer

Notice should be given to all creditors who voted in favour of a scheme of arrangement in order for such creditors to establish if there was certain relevant information which was not drawn to their attention, or which they were not aware of, or which would have affected their decision. Notwithstanding having voted in favour, should any such creditor establish that there was relevant information which would have affected their decision that they were not aware of, such creditor is entitled to oppose the application on these grounds and motivate to the Court that it should not sanction the proposal.

Question 6

What role (if any) does the Master of the High Court play in a section 155 compromise?

Answer

The Master of the High Court only has a role where the compromise or arrangement has been made by a liquidator on behalf of a company being wound up. Where a compromise or arrangement has been made by a liquidator on behalf of a company being wound-up, then the report of the Master of the High Court, required in terms of the laws contemplated in item 9 of Schedule 5 of the Companies Act 2008, must be attached to the application to Court to sanction the compromise or arrangement.

Question 7

If all creditors vote in favour of a compromise, can a court in a subsequent application refuse to sanction it? If it can, kindly motivate your answer.

Answer

Yes, the Court can refuse to sanction a compromise or arrangement even if all creditors have voted in favour of it, but the Court is unlikely to do so as the Court is loath to impose its own views over the views of the creditors. The Court must however use its discretion to sanction the compromise or arrangement where it is just and equitable to do so. The Courts have refused to sanction compromises where they were not satisfied with the procedural fairness of the vote or where it had been shown that creditors voted in classes in which they should not have voted, or the classes should have been created for certain of the creditors given their rights and interests but were not and the creditors were thus not afforded an opportunity to vote in these classes. It should be noted that the Court, in exercising its discretion, may correct mistakes in the proposal, it cannot alter the substance of the proposal or impose any term or condition on creditors which they did not agree to.



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