

**PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023**

**Formative Assessment (Practice Examination) Date: 26 – 27 October 2023**

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

**EXAMINERS**

**Dr E Levenstein Professor A Loubser Mr T Jordaan Ms R Webster Mr B Duma**

**Mr D van der Merwe Ms N Harduth Mr C Rey Ms L Kahn Mr J Evans Ms J de Hutton Ms N Mabaso Mr P van den Steen Ms A Cohen Mr D Lake Ms J Mitchell-Marais**

**Ms A Timme Mr S Smyth Mr G Rudolph Ms R Thomson Mr C Strime**

**MODERATORS**

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

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

**All candidates are expected to comply with ALL the instructions.**

**INSTRUCTIONS**

1. This assessment paper will be made available at **13:00 (1 pm) SAST on Thursday 26 October 2023** and must be returned / submitted by **13:00 (1 pm) SAST on Friday 27 October 2023**. Please note that assessments returned late will not be accepted.

2. All assessments must be submitted electronically in Microsoft Word format, using a standard A4 size page and an 11-point Avenir Next font (if the Avenir Next font is not available on your PC, please select the Arial font). This document has been set up with these parameters – **please do not change the document settings in any way**. **DO NOT** submit your assessment in PDF format as it will not be accepted.

3. No limit has been set for the length of your answers to the questions. Please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case). Candidates who include very long answers in the hope it will cover the answer the examiners are looking for, will be appropriately penalised.

4. You must save this document using the following format: **studentID.Paper1Formative**. An example would be something along the following lines: 202223-336.FormativeAssessment. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words “studentID” with the student number allocated to you). Do not include your name or any other identifying words in your file name.

5. The assessment can be downloaded from your student portal on the INSOL International website. The assessment must likewise be returned via your student portal as per the instructions in the Course Handbook for this course. **If for any reason candidates are unable to access their student portal, the answer script must be returned by e-mail to** **david.burdette@insol.org****.**

6. Due to the high incidence of load shedding currently taking place across South Africa, candidates are required to determine whether any load shedding is scheduled during the examination period and, if so, to make alternative arrangements to write elsewhere if at all possible.

7. Enquiries during the time that the assessment is written must be directed to David Burdette at david.burdette@insol.org or by WhatsApp on +44 7545 773890 or to Brenda Bennett at brenda.bennett@insol.org or by WhatsApp on +27 66 228 2010. Please note that enquiries will only be responded to during UK office hours (which are 9 am to 5 pm BST, or 11 am to 7 pm SAST).

8. While the assessments are open-book assessments, it is important to note that candidates **may not receive any assistance from any person** during the 24 hours that the assessment is written. **Answers must be written in the candidate’s own words; answers that are copied and pasted from the text of the course notes (or any other source) will be treated as plagiarism and persons who make themselves guilty of this will forfeit the assessment and disciplinary charges will follow**. When submitting their answers, candidates will be asked to confirm that the work is their own, that they have worked independently and that all external sources used have been properly cited. If you submit your assessment by e-mail, a statement to this effect should be included in the e-mail.

9. Once a candidate’s assessment has been uploaded to their student portal (in line with the instructions in the Course Handbook), a confirmatory e-mail will be auto-generated confirming that the assessment has been uploaded. If the confirmatory e-mail is not received within five minutes after uploading the assessment, candidates are requested to first check their junk / spam folders before e-mailing the Course Leader to inform him that the auto-generated e-mail was not received.

10. The model answer will be provided **after the closing time of submission for the practice examination at 1 pm on Friday 27 October 2023**. Due to the short time frame between the formative and the summative assessments, the formative assessment will not be marked, hence the provisions of the model answers so that candidates may compare their answers in preparation for the summative assessment (examination).

11. **You are required to answer this paper by typing the answers directly into the spaces provided** (indicated by text that states [Type your answer here]). For multiple-choice questions, please highlight your answer in yellow, as per the instructions included under the first question.

12. Since you have 24 hours within which to answer the assessment, it is suggested that you take the time to read through the assessment in its entirety before attempting to answer the questions.

**ANSWER ALL THE QUESTIONS**

**QUESTION 1**

Questions 1.1 – 1.20 are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and mark your selection on the answer sheet by highlighting the relevant paragraph **in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question. Each of the 20 questions count 1 mark.

**Question 1.1**

Choose the **correct** statement:

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

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

**Question 1.2**

Choose the **correct** statement:

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

(a) A special resolution by the company’s shareholders.

(b) A resolution by the company’s board of directors.

(c) A resolution by a majority of the company’s independent creditors.

(d) An ordinary resolution by the company’s shareholders.

**Question 1.3**

Choose the **correct** statement:

The moratorium is a defence *in personam* because:

(a) It is a personal but temporary benefit that is only available to the company in business rescue, its business rescue practitioner and creditors.

(b) It is a personal but temporary benefit available to the company in business rescue and all affected persons as defined in the Companies Act of 2008.

(c) It is a personal but temporary benefit available to the company in business rescue with the result that a creditor of the company in business rescue has legal standing to rely on non-compliance with s 133 as a defence.

(d) It is a temporary personal defence and benefit available to the company in business rescue, with the result that the business rescue practitioner of the company in question may invoke the moratorium in the event of non-compliance with section 133 of the Companies Act of 2008.

(e) It is a personal defence and benefit available indefinitely to the company in business rescue, with the result that the business rescue practitioner of the company concerned may invoke the moratorium to permanently defeat the claims of creditors in order to improve the prospects of rescuing the company in financial distress.

**Question 1.4**

Choose the **correct** statement:

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

1. As the business rescue practitioner has full management control of the company during business rescue, he is entitled to make all decisions regarding the disposal of assets on his own.
2. A board of directors is not absolved of its duties, powers and obligations during business rescue and continues to represent the company. As such the board can dispose of property on behalf of the company in business rescue, as long as such disposal meets the requirements of section 134 of the Companies Act 2008.
3. The business rescue practitioner and the board of directors have to act jointly when disposing of assets in terms of section 134 of the Companies Act 2008.
4. Both statements (b) and (c) are correct.
5. None of the above statements are correct.

**Question 1.5**

Choose the **correct** statement:

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

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

1. Business rescue costs.
2. Post-commencement finance.
3. Preferent claim in business rescue.
4. Secured claim.
5. Unsecured claim.
6. Damages claim.

**Question 1.6**

Choose the **correct** statement:

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

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

**Question 1.7**

Choose the **correct** statement:

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

1. A shareholder or creditor of the company, registered trade union representing the employees of the company; and employees of the company that are not represented by trade unions.
2. Directors of the company, shareholder or creditor of the company and employees of the company.
3. Shareholders or creditors of the company, suppliers of the company; and employees of the company that are not represented by trade unions.
4. None of the above.

**Question 1.8**

Choose the **correct** statement:

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

1. You did not and do not meet the requirements of section 138 of the Companies Act 2008 when appointed.
2. You are not independent.
3. You are incompetent.
4. You have failed to perform the duties of a practitioner.
5. You have engaged in illegal conduct.
6. You have a conflict of interest.
7. You are incapacitated.
8. (i)
9. (ii)
10. (i) and (ii)
11. (vi)
12. (i), (ii) and (vi)

**Question 1.9**

Choose the **correct** statement:

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

1. The creditors have a direct and substantial interest in the subject matter of the litigation.
2. A business rescue plan has been adopted by the creditors.
3. An application is brought to set aside a published business rescue plan that has not yet been adopted by creditors.
4. All of the above.

**Question 1.10**

Choose the **correct** statement:

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

1. They fall outside the ambit of the adopted business rescue plan and are thus not bound by it. Their claim needs to be verified and they need to be paid based on a separate arrangement with the creditor exclusively. The claim of not having received notice places a risk on the validity of the business rescue proceedings.
2. They fall outside the ambit of the adopted business rescue plan, have foregone their opportunity to be recognised as a creditor and therefore have no claim nor any standing. The fact that they claim that they have not received notice is irrelevant.
3. The business rescue practitioner asks them to cast a vote late and re-calculates the outcome of the section 151 meeting. Then notifies the affected persons of the revised outcome.
4. The creditor is recognised and bound by the adopted plan regardless of whether they were present and voting at the section 151 meeting. Substantial notices were issued across the various methods as prescribed by the regulations.
5. The business rescue practitioner rejects the claim on the basis that it is late and excludes the creditor from the distribution list.

**Question 1.11**

Choose the **correct** statement:

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

1. The business rescue practitioner only requires 50% of the shareholders to vote in favour of the plan to amend shareholder rights and given that Shareholder A already has 60% of the shares, it could pass the vote on its own.
2. In terms of section 136 (2), the business rescue practitioner has the right to “…entirely, partially or conditionally suspend, for the duration of the business rescue proceedings, any obligation of the company that arises under an agreement to which the company was a party at the commencement of the business rescue proceedings…”, and hence, the business rescue practitioner can suspend the minority shareholder rights in the shareholders’ agreement.
3. The business rescue practitioner can only proceed with the proposed rights issue if the company already has sufficient authorised but un-issued shares.
4. All of the above.
5. The business rescue practitioner does not have the right to proceed due to the minority shareholder rights contained in the shareholders’ agreement.

**Question 1.12**

Choose the **correct** statement:

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

1. Material assumptions on which the projections have been based as contained within the published business rescue plan and as if it has been adopted.
2. The expected forecast trading and financial position of the company were the plan not to succeed and the business were to continue trading “as is”.
3. An alternative plan to that presented in the rescue plan.
4. All of the above.
5. None of the above.

**Question 1.13**

Choose the **correct** statement:

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

* 1. Critical to keep them at all costs.
	2. Really valuable to keep them.
	3. Important if possible to maintain, assist with knowledge, bandwidth and continuity.
	4. Best to divide into those who agree with business rescue practitioner *versus* not (and side-line / remove) those who don’t agree.
	5. Doesn’t matter at all as the business rescue practitioner has all the power.

**Question 1.14**

Choose the **correct** statement:

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

There are no creditors and the shareholders vote in favour of its adoption.

It is supported by more than 51% of all the creditors and approved by the shareholders of the company.

It is supported by more than 75% of all the creditors who voted, and at least 50% of the independent creditors’ voting interests.

The plan alters the rights of shareholders of any class, but the majority of the affected shareholders nevertheless support the adoption of the plan.

Only (c) and (d) are correct.

**Question 1.15**

Choose the **correct** statement:

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

* + 1. It applies only to individual consumer debtors and not to companies.

It applies only to companies and not to individual consumer debtors.

It applies to both individual consumer debtors and companies, under the Insolvency Act of 1936, and the Companies Act of 2008, respectively.

It does not apply to either individual consumer debtors or companies.

**Question 1.16**

Choose the **correct** statement:

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

* + 1. In business rescue, creditors will be notified of the company’s financial distress, whereas a liquidation application does not require notice to creditors.

(b) A liquidator has certain investigative powers that a business rescue practitioner does not have.

(c) Liquidations are quicker and more cost effective than business rescue.

(d) In a liquidation context, it is possible to prevent dispositions made by the company outside of the ordinary course of business.

1. The threshold / degree of financial distress is lower in the case of liquidation, and therefore the board would be able to be displaced more easily if it were placed into liquidation than if it were placed under business rescue.

**Question 1.17**

Choose the **correct** statement:

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

1. At any time.
2. At any time between the *concursus* of creditors and the interim liquidation order is granted.
3. At any time before the final order of liquidation has been granted.
4. At any time before the liquidator has prepared the final liquidation and distribution account.
5. Never – it is only possible to convert a business rescue into liquidation.

**Question 1.18**

Choose the **incorrect** statement:

Business rescue proceedings end -

1. when the business rescue plan has been rejected by creditors and nothing further is done.
2. when the business rescue practitioner files a notice of substantial implementation of the rescue plan.
3. when no business rescue plan is published within the prescribed period or extended period.
4. when the practitioner files a notice that a company in voluntary business rescue is no longer financially distressed.

**Question 1.19**

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

1. the right to participate in court proceedings;
2. the right to be given notice of all court proceedings;
3. the right to be given notice of all creditors’ meetings;
4. the right to be represented on the creditors’ committee where creditors decide that such a committee is necessary.

**Question 1.20**

Choose the **correct** statement:

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

1. Business rescue cost.
2. Post-commencement finance.
3. Preferent claim in business rescue.
4. Secured claim.
5. Unsecured claim.
6. Damages claim.

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

**CASE STUDY**

**MEROPA RETAIL GROUP LIMITED**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. the instalment sale agreements with Wonderworld Autos, opted to cancel the relevant instalment sale agreements whilst retaining possession of the delivery vehicles that formed the subject of those agreements, and was of the view that such vehicles could not be recovered by Wonderworld Autos as a result of the protections afforded by the moratorium against legal proceedings;

(ii) the commercial lease agreements with Real Landlords, refused to vacate the relevant warehouses and storage facilities due to their significance to the ongoing operation of Meropa Retails’ business, notwithstanding the fact that Real Landlords had validly cancelled the lease agreements, as Meropa Retail had fallen into arrears of its rental payment obligations;

(iii) the various prejudicial and onerous contracts that he had identified, proceeded to entirely or partially suspend the obligations of Meropa Retail thereunder; and

(iv) the additional 800 employees that were hired by Meropa Retail post the restructure, unilaterally amended and varied their employment terms and conditions, by reducing their salaries and benefits. In addition, Mr Nkosi began considering the retrenchment of Meropa Retail’s remaining workforce.

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

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

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

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

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

**Question 2**

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

Under the Companies Act a resolution to commence business rescue (BR) cannot be adopted if liquidation proceedings have already been initiated against the company. Where this is the case the only way that the entity may enter into business rescue rather than continue with the liquidation proceedings, would be an application to the court by an affected person in terms of S131. Additionally, under S129(2)(b) a resolution to commence business rescue is not prohibited, it is the mere adoption of a business rescue plan that is prohibited, and not the filing of the business rescue plan.

In this context, the business rescue resolution was commenced and eventually adopted and approved and finally reached substantial execution. It is evident therefore that the application of the Business rescue plan is not merely the application but rather the adoption and execution of the plan that may be in contravention of the company's act.

In assessing whether the BR process was in contravention we need to consider the fact that under the companies Act 2008 there is no clear definition of the word “Initiated”, as the timing within the process is crucial for establishing whether the liquidation process was contravened. Due to the fact that there is no clear definition of within the companies act there are various court cases which we can use to assess the position.

Under the given circumstances it appears that Urban Shopfitters CC was in the process of preparing the liquidation application, and was therefore still in the preliminary phase of the liquidation process and had not yet filed the liquidation application in court, or served to the entity. Under the FirstRand Bank Ltd v Imperial Crown Trading the court held that initiated would mean commence and the process of preparing the liquidation application could constitute the commencement.

However, under the context and the stage of the process that Urban shopfitters CC was in it is more likely that the case set out in Tjeka Training Matters (Pty) Ltd v KPPM Construction (Pty) Ltd and Others would be more substantiated. Due to the fact that the process was in the infant stage where the entity had yet to file or process the liquidation order. In Tjeka the court held that the issuing of an application without the company being aware of its existence cannot be said to be “Initiated” against the company, as they would be unaware of such initiation. Under the current circumstances it is unlikely that the court would look to the FirstRand case due to the infancy of the process and it can be reasonably ascertained that the process of initiation would not have been met, and would not automatically make the application invalid.

The validity of the business rescue initiation would require an assessment of the procedures followed in term of the application of the process against the companies act requirements.

The purpose of Business rescue under S128 of the Companies Act would need to be considered to determine whether the application for BR would constitute a valid application. S128 states that the business rescue process is aimed at restructuring the affairs of the company in such a way that will either maximize the likelihood of the company continuing existence on a solvent basis or if not possible, will result in a better return for the stakeholders (Creditors) of the entity from Immediate liquidation. Under the current situation it is clear that the company is highly leveraged but has historically managed to trade out of the position through its operational performance, and has been significantly negatively affected by various factors outside its controls. It is therefore likely that a business rescue will meet the S128 requirements under a competent BR practitioner.

S129(1) states that the board of directors may resolve to voluntarily begin the business rescue proceedings if they believe that the company is distressed and it appears that there is a reasonable prospect of the company being rescued. Under S128 it is clearly evident that the company is currently in distress as the company has not been able to pay their debts as they become due and payable, evidenced by the summons submitted by JCSSP and the letter of demand submitted by SARS.

Additionally, on the face of the financial statements the company was not already insolvent as its assets exceeded its liabilities, the financial stress arose due rather to the entity not being able to meet its obligations as they fall due. It therefore appears reasonable that the board of directors could resolve to begin voluntary business rescue under S129(1).

In consideration of the resolution of the board of directors being done in accordance to the requirements of the Companies Act, as well as the understanding of the facts around the application of liquidation, the application to enter into Business rescue appears valid, and will in all likelihood result in a better outcome than a liquidation.

**Question 3**

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

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

The summons that was submitted against the company would not defer or alter the commencement of business rescue. In addition due to the General moratorium that the business rescue provides under S133, The business rescue process enjoys the protection of any legal proceedings instituted against it. Therefore CSS would not have any legal availability to enforce the summons and continue to pursue the entity for the amounts owing unless they meet one of the execeptions noted within S133 being:

1. With the consent of the practitioner.
2. With Leave of the court
3. As set off against any claim made by the company in any legal proceedings
4. Criminal proceedings

Therefore unless Mr Nkosi provides leave to CSS as the BR practitioner or any of the other exceptions are met, which is unlikely given the facts highlighted in the case study, the claims will not stop the proceedings and will not be enforceable during the BR process.

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

The letters of demand will not hinder the commencement of the business rescue process. These would just serve as evidence of the claims to which SARS will have against the entity in the business rescue process, which will be classified as concurrent claims in the waterfall distribution.

**Question 4**

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

Under the Companies act the general moratorium will apply to all claims instituted against the company. The question is therefore whether the protection provided by the general moratorium will extend to the directors of Meropa where they to have provided surities for the debts. Under S133(1) it is clear that the general moratorium constitutes a personal defence that is afforded to the company and does not have the effect of extinguishing or discharging the obligations of the debtor who is providing suretyship. As such the moratorium would offer the directors no such security and they will remain liable for their surety over the debts. This has been confirmed in the SCA Newport Finance Company (Pty) Ltd and Another v Nedbank and Mostert and Another v Nedbank limited.

**Question 5**

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

Due to the fact that the agreement contains appropriate reservations of ownership clauses”it is evident that the agreement is a financing agreement, where ownership of the assets will only pass once the full purchase price has been settled. As such this would constitute a Security interest as the agreement will be secured by the underlying assets.

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

A security interest is where the movable property of an entity has a registered special/notorial bond in favor of a third party. Where in the event of default on their contract the movable assets will be used as security and provide the third party a secured claim against the entity. The Movable assets are therefore not owned or leased by the third party, but they have the right to third party should the entity default on their contractual agreement.

In contrast to the property interest where the ownership rights related to the assets are only transferred on final payment. Therefore, the instalments are merely a partial payment of the total contractual amount and result in no transfer of the asset's ownership. These assets are therefore held as security against the final purchase price agreed upon. The same will hold true where the owner of the property has reserved the ownership of the assets during the contractual agreement and the assets act as security to the entity.

**Question 6**

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

The cancellation of the installment sale agreement may be unilaterally canceled under the provisions of S136(2)(a), where a business rescue practitioner has the ability to cancel an onerous contract preventing it or which may prevent it from being rescued. This section would apply as these contracts were standing before the entity entered into business rescue and they fall due during the business rescue proceedings.

Due to the nature of the installment sale agreement, the ownership of the vehichle would only pass once the final installment has been paid. The contract between Meropa and Wonderworld had been validly cancelled and agreed upon between both parties. As such Meropa retail are not the rightful owners of the vehicles, and maintaining them in the company's possession would constitute an unlawful act. The question is therefore whether the Moratorium may provide protection and allow the entity to hold the assets during the business rescue process. Section 133 moratorium only extends its protection to anyone attempting to lay a claim against the company’s own property or property that is lawfully in its possession. Due to the fact that the ownership of the vehichle has not passed and the vehicles remain in the lawful ownership of Wonderworld Auto, Meropa would not be entitled to retain the assets, and the assets would fall outside the scope of the moratoriums protection. This was confirmed in the Madodza (Pty) Ltd v ABSA Bank Limited and Others case.

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

Under the Companies Act the rights of the employees are highly regarded and protected as a basic principle. Therefore a business rescue practitioner may not unilaterally amend or vary the terms of a contract of employment.

In order for the BR practitioner to vary the terms of employment they are required to ascertain if there is a collective agreement in place with organized labor that would allow for such actions to be enforced. In the absence of such an agreement, Mr Nkosi would need to obtain an agreement between the two parties to be able to amend their contracts.

**Question 7**

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

In determining the respective rights held by the entities it is important to establish the instruments if any that they hold:

1. Meropa Holdings Limited, is a 60% shareholder of the ordinary share capital.
2. Orlando Investments, holds 35% of the ordinary shares and preference shares amounting to R2,500,00,000.
3. Management Holdco Proprietary Limited, 5% Shareholder of the ordinary share capital.

The above can therefore be split into two main instruments which will be assessed separately below, namely a shareholder interest in the entity and preference shares.

Under the Companies Act shareholders will among others be classified as an affected person. As affected persons, they are afforded the right to be notified, participate in, and object to the business rescue proceedings. They are additionally able to bring an application to commence the business rescue proceedings of the entity. The shareholders will have the right to participate in court proceedings and other business rescue meetings. Where the plan results in the alteration of the rights of the instruments, those affected holders will have the right to vote on the approval or rejection of the proposed business rescue plan. In determining the extent of the right to vote against the business rescue plan it is important to understand the implication and definition of the “Altercation of the rights of the company’s securities” would constitute. The alteration of the right would require a change in the classification or status of any issued securities, therefore does not arise as a result of a monetary dilution of the value of the equity S137(1)(a) and (b) Companies Act 2008. Where any of the securities of the company are amended in the aforementioned manner, the business rescue practitioner would be required to consult the shareholders (Irrelevant of the % shareholding held at the time) before preparing the business rescue plan this was further confirmed in the case of Hlumisa Investments Holdings (RF Limited and Another) v Van der Merwe NO and Others.

Additionally where a business rescue plan is not voted in and the practitioner does not seek a revised approval for a revised plan, shareholders have the right to vote for the practitioner to prepare and publish a revised plan, alternatively apply to court to set aside the results of the cote on the basis that the voting was innapropriate.

It is also important to note that there are certain rights that are retracted from the shareholders during a business rescue process, such as the requirement for a shareholders special resolution to dispose of all or greater part of the assets, will no longer be required under the business rescue as the business rescue practitioner with the board of directors would be able to dispose of the property.

The preference shareholders will have the same rights however in the case of Meropa, there is no change in the specific class of shareholders, and they will therefore not have a right to vote in the business rescue plan, however all other rights will be afforded to them as mentioned above.

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

Yes, Mr Nkosi could have removed Mr Khumalo as a director, on various grounds in accordance with the provisions of the Companies Act. Under the companies act S137(5) in addition to S162 of the companies act the removal of Mr Khumalo would be warranted due to the un co-operative nature and reluctancy of Mr Khumalo to provide Mr Nkosi with information and records of the entity. Proving himself obstructive to the business rescue process and hindering the practitioner's ability to develop the business rescue plan and perform his duties as a BR practitioner effectively.

**Question 8**

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

A business rescue practitioner may only be removed by way of court order in terms of S130 or S139 of the Companies Act 2008. Under S139(2) the following reasons are deemed potential grounds for removal:

* Incompetence or failure to perform their duties
* Failure to exercise the proper degree of care in the performance of the practitioner functions
* Engaging in illegal acts or conduct
* No longer meeting the requirements for the appointment of the practitioner in S138
* Having a conflict of interest or lack of independence
* Becoming incapacitated and unable to perform the functions of a practitioner and being unlikely to regain that capacity within a reasonable time

Given the above and an understanding of the appointment of Mr Dunce, it is clear that the Mr Dunce appointment was in breach his role as a business rescue practitioner for Meropa. As there was a clear conflict of interest and lacked the independence that is required for a practitioner, and potentially engaged in Illegal acts or conduct. His removal from office was therefore warranted.

S138 additionally states that the person appointed must be in good standing of legal, accounting and business management profession, his removal as a director previously is in direct contradiction to these requirements and is additional ground for his termination.

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

My Dunce was initially incorrectly appointed by the Board of Directors as the appointment was in contravention of the requirements of the appointment of a BR practitioner. The practitioner was therefore appointed as a practitioner by the company in terms of S129(1)(b) under a voluntary BR process. As such the substitute appointment should be made by the company or affected person who brought the business rescue application S131(5), the employees would therefore be incorrect in their assumptions to appoint the replacement of the BR Practitioner. As the board of directors would be required to elect a BR practitioner.

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

The remuneration of a business rescue practitioner is dealt with under S143 of the companies act, read together with regulation 128,127(2) and 26(2) of the Companies Regulations 2011, which will need to be assessed to determine whether the success fee was within the confines of the act of whether the entity has a claim against the BR practitioner.

The practitioner is entitled to propose or negotiate a success fee that is contingent on a certain outcome that has been approved by a majority of the creditors voting interest and the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholders to a portion of the residual value upon winding up. In the Case of Meropa and the success fee paid by Mr Nkosi from Mr Nkosi it is evident that there was a lack of consensus and agreement over the success fee. The fee was therefore illegally extracted from the company by the business rescue practitioner and Meropa is able to apply to court to recover the monies distributed.

**Question 9**

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

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

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

 **(8)**

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

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

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

In the Wescoal Mining Case (Pty) Ltd it was determined that PCF funding does not carry any voting rights. In addition, the preference share do not attain any voting rights as there is no change in the class of shares as such S152(3) will not be applicable to the preference shares.

**Question 10**

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

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

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

The Companies Act 2008 only requires a projected income statement for the ensuring three years, however, if Mr Nkosi would like to adhere to “best-Practice” this would not be deemed sufficient. Suggested best practice would be to include at a minimum both a balance sheet and income statement for the ensuing three years. In addition, it is prescribed to include a cash flow forecast for the same time period, as the companies ability to generate cash under the forecasted assumptions is a critical component of the business rescue process and to demonstrate the ability of the BRP coming to fruition, and achieving the proposed payments.

Including the forecasted balance sheet for a minimum of three years will allow the creditors to assess the solvency and liquidity of the business and ensure that the business rescue plan appears reasonable.

In addition Mr Nkosi is required to include all the assumptions that are used in preparing the forecasted figures.

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

Meropa retail is a retail group that operates as a clothing, footwear and homeware retail company there are therefore various drivers which will be required to be assumed in the forecasted financial statements.

The Entity has a significant employee base which will attract significant costs to the company. Therefore, it is expected that the employee information related to the expected number of employees, the expected wage rate (Forecast versus Historical and growth rate used) as well as the expected additional costs such as retrenchment and restructuring cost associated with the employees.

The main driver of the entity being a retail entity would be the revenue and the expected margins on the products. Therefore, within the assumption, we would expect to see the projected revenue, including the number of revenue-generating stores going forward, the average selling price, potential product mix, unit sales as well as the growth assumptions used for these prices. In addition, the cost price for the respective sales indicates the forecasted gross margins expected on the product to determine if there would be sufficient headroom to absorb the operating costs and the high level of expected gearing required.

Due to the fact that the entity operate largely out of leased stores the forecasted number of stores, including the lease costs per meter squared, the increase in these costs, the utilization of floor space, assumptions around the leases that will reach the end of term (Renewal and cancellation assumptions) within the prevailing three years and the forecasted rate increase.

**Question 11**

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

Under S 152(4) of the Companies Act it states that the business rescue plan will be binding on all creditors of the entity if more than 75% of all creditors and 50% of independent creditors vote in Favor of the plan. Therefore in the circumstances of Meropa Retail business rescue plan where these conditions have been met, the creditors that did not vote are bound to the business rescue plan and the provisions within the “Cram-down” principle, regardless of whether or not they were present or voted against the adoption of the plan.

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

Section 154 of the Companies Act deals with the provision of the discharge of the debts and claims of the creditors. Within this section, a clear difference arises between the enforcement of dissenting creditors and creditors who voted for the business rescue plan. The provisions set out in S154 will apply only to those creditors who voted for the business rescue plan and will result in these creditors losing their rights to enforce their debts as they have accepted the discharge of their debts.

This is in contrast to dissenting creditors where the debts of these creditors are not discharged they are merely limited in enforceability. This was confirmed in Van Zyl v Auto Commodities (Pty)Ltd case. The Dissenting creditors therefore are merely limited in enforcing their claim but are not seen to have discharged there claim s154(2).

 **TOTAL MARKS: [100]**