



INSOL
INTERNATIONAL



PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023

Summative Assessment (Examination)

Date: 16 - 17 November 2023

Time limit: 24 hours (from 13:00 SAST on 16 November 2023 to 13:00 SAST on 17 November 2023)

Mr M Mpolokeng Dr E Levenstein Professor A Loubser Mr T Jordaan Ms R Webster
Mr B Duma Mr D van der Merwe 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 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.

Commented [BB1]: TOTAL = 75/100 (mark adjusted upwards) - Well done excellent result.

INSTRUCTIONS

1. This assessment paper will be made available at **13:00 (1 pm) SAST on Thursday 16 November 2023** and must be returned / submitted by **13:00 (1 pm) SAST on Friday 17 November 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 be returned to you unmarked.
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.SummativeAssessment**. An example would be something along the following lines: 202223-336.SummativeAssessment. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. 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 GMT, 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. If a candidate is unable to complete this summative assessment (examination), please note that a re-sit assessment will only be given if there are exceptional circumstances that prevent the candidate from completing or submitting it (such as illness). Feedback on the final assessment will be provided within four weeks of the paper having been written - please do not enquire about your marks before four weeks have elapsed. Please note that the model answers to this assessment will NOT be provided to candidates on the course after the assessment has been written.
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.

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Question 1.1

Choose the **correct** statement:

Sensational Cycles Proprietary Limited rents bicycles to tourists at the Cape Town promenade. Due to a decrease in tourism and cold, wet winter months, business is slow and the loans taken out by the Sensation Cycles from its bankers are now to falling due. You have been approached for advice to determine whether the company is a candidate for business rescue. Which of the following statements correctly describes the test for financial distress?

Commented [M3]: 1 mark

- (a) It appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due within the immediately ensuing six months.
- (b) It appears to be reasonably unlikely that the company will be able to pay the overwhelming majority of its debts as they become due within the immediately ensuing six months.
- (c) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.
- (d) Both (a) and (c) are correct.

Question 1.2

Choose the **correct** statement:

Unlike in some other jurisdictions which have debtor-in-possession regimes, in South Africa an independent person is appointed as the business rescue practitioner who supervises the company during its business rescue proceedings. Which of the following statements is correct?

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- (a) During a company's business rescue proceedings, the business rescue practitioner consults with the board of directors and external advisors in preparing and implementing a business rescue plan to return the company to profitability.
- (b) During a company's business rescue proceedings, the business rescue practitioner has full management control of the company in substitution for its board and pre-existing management.
- (c) During a company's business rescue proceedings, the business rescue practitioner is statutorily obliged to supervise the company together with the pre-existing management and the board of directors.
- (d) During a company's business rescue proceedings, the business rescue practitioner is not empowered to remove any of the company's pre-existing management.

Question 1.3

Commented [M5]: 1 mark

Choose the **correct** statement:

An application to court for the commencement of business rescue in respect of a company that is already in liquidation:

- (a) is not allowed by the Companies Act 2008.
- (b) may only be made before a final liquidation order has been issued.
- (c) may only be made before a provisional liquidation order has been issued.
- (d) may be made before the company is dissolved.

Question 1.4

Commented [M6]: 1 mark

Choose the **correct** statement:

The general moratorium is one of the critical components of business rescue because:

- (a) it affords the company in business rescue sufficient time to avoid paying its creditors for the benefit of its shareholders who own the company in business rescue as provided for in section 133 of the Companies Act of 2008.
- (b) it gives the company in business rescue sufficient breathing space to restructure its affairs by staying or prohibiting all legal proceedings against the company in business rescue in terms of section 130 of the Companies Act of 2008.
- (c) it gives the company in business rescue a period of respite to allow the company in business rescue to restructure its affairs by staying or prohibiting legal proceedings

against the company in question in terms of section 133(1) of the Companies Act of 1973.

(d) it gives the company in financial distress a period of respite to restructure its affairs by suspending or precluding legal proceedings against the company while in business rescue as stipulated in section 133(1) of the Companies Act of 2008.

(e) All of the above.

Question 1.5

Commented [M7]: 1 mark

Choose the **correct** statement:

Company X files for business rescue. Its only source of revenue is the proceeds of sales to its clients on credit. These debtors are ceded to X Bank as security for its loan to the company.

The company simply cannot survive if it does not have access to the proceeds of the payments by these clients from time to time. Under these circumstances, the business rescue practitioner may:

- (a) continue to utilise the proceeds of the debtors to operate the company as these debtors are not "property" as defined in the Companies Act.
- (b) approach the Court for an order to compel X Bank to consent to the company utilising the proceeds of these debtors in order to save the Company.
- (c) ensure that the total debtors' book does not decrease, by replacing every debtor receipt with at least an equal new sale to ensure that X Bank is not prejudiced by the continued use of the proceeds of the debtors to fund the ongoing operations of the company in business rescue.

(d) approach X Bank for their consent to utilise the proceeds of these debtors for the ongoing operations of the company.

Question 1.6

Commented [M8]: 0 marks

Choose the **correct** statement:

As at the commencement of the business rescue process, X Bank holds security by way of a registered general notarial bond over of all of the assets of a company in business rescue.

X Bank may:

- (a) take possession of the assets subject to its security and sell it in order to reduce the company's indebtedness to X Bank.

(b) insist that the business rescue practitioner obtain their consent before selling any of the assets subject to the general notarial bond, as provided for in section 134 of the Companies Act.

(c) not prevent the business rescue practitioner from disposing of the assets subject to the general notarial bond in the normal course of business by the company during business rescue proceedings

(d) seek an order of Court to perfect their security, without the consent of the business rescue practitioner, in order to protect their rights.

Question 1.7

Commented [M9]: 0 marks

Choose the **correct** statement:

A company is leasing the property from which it is conducting its business. The company is placed in business rescue and continues to conduct its business from the property. The landlord has a claim for arrear rentals that have been incurred whilst the Company is in business rescue. This claim ought to be classified as:

(a) a business rescue cost.

(b) post-commencement finance.

(c) a preferent claim.

(d) a secured claim.

(e) an unsecured claim.

(f) a damages claim.

Question 1.8

Commented [M10]: 1 mark

Choose the **correct** statement:

You are appointed as business rescue practitioner in a large manufacturing business and within the first few weeks of your appointment an employee approaches you and advises you that they have been unsuccessful in obtaining authorisation for certain medical costs from the group medical scheme of the company since the filing for business rescue has taken place. The employee informs you that the medical scheme has indicated that due to non-payment of the deductions relating to the medical scheme by the company, that all of the benefits to employees under the scheme have been suspended. What would your advice to the employee be in relation to this issue?

- (a) Unfortunately, the employee would need to make payment of the outstanding amounts due to the medical scheme in order for the employee to enjoy further benefits from the group medical scheme.
- (b) As the benefits under the group medical scheme have been suspended, an alternative medical scheme would need to be sought by each employee, for the period of business rescue.
- (c) The group medical scheme, which exists for the benefit of both past or present employees of the company, would have an unsecured claim in the business rescue proceedings for the amounts that were not paid to the group medical scheme immediately prior to the commencement of business rescue proceedings and as such the medical scheme would not be entitled to suspend the benefits to such employees as the group medical scheme, as it is a creditor of the company in business rescue.
- (d) The group medical scheme would have a secured claim in the business rescue proceedings.
- (e) None of the above.

Question 1.9

Commented [M11]: 0 marks

Choose the **correct** statement:

The business rescue practitioner has an obligation to consult with creditors, other affected persons and the management of the company:

- (a) during the process of preparing a business rescue plan for consideration and adoption.
- (b) after preparing a business rescue plan for consideration and adoption.
- (c) before preparing a business rescue plan for consideration and adoption.
- (d) Both (a) and (c) are correct.

Question 1.10

Commented [M12]: 1 mark

Choose the **correct** statement:

You are a member of SARIPA and 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 small company and are busy implementing the business rescue plan that was adopted by creditors in that matter. You have been

approached by your brother-in-law to accept appointment as the business rescue practitioner of a large company that he is a director and shareholder of. Which of the below are appropriate?

- (i) You should not accept appointment as you have a conflict of interest.
- (ii) You can accept appointment.
- (iii) You should not accept the appointment as the company's business rescue practitioner as you are not independent.
- (iv) You should not accept appointment as you lack the necessary skills and do not meet the legislated criteria.

Your answer is:

- (a) (i).
- (b) (ii).
- (c) (iii).
- (d) Both (i) and (iii).
- (e) Both (iii) and (iv).

Question 1.11

Commented [M13]: 1 mark

Choose the **incorrect** statement:

- (a) The board of directors of the company can commence business rescue voluntarily by passing a board resolution, provided that it has reasonable grounds to believe that the company is financially distressed and there is a reasonable prospect of rescuing the company.
- (b) A creditor of a company can approach the High Court to place the company in business rescue, as long as the board of the company has not already adopted a resolution to begin business rescue proceedings.
- (c) As an affected person, an employee, an employee representative, a registered trade union, a shareholder or a director of a company can approach the High Court to place the company in business rescue, as long as the board of the company has not already adopted a resolution to begin business rescue proceedings.
- (d) Notwithstanding any financial distress, an affected person of a company may approach the High Court to place the company into business rescue provided that it is just and equitable to do so for financial reasons and there remains a reasonable prospect of rescuing the company.

Question 1.12

Commented [M14]: 1 mark

Choose the **correct** statement:

A foreign-domiciled unsecured creditor is owed money by a company in business rescue for services that it supplied to the company outside of South Africa before the company entered business rescue. The creditor is refusing to recognise the approved business rescue plan, refused to vote on the plan when called to do so, and is arguing that their claim is not compromised by the moratorium because their debt was established and is owed outside of South Africa. How should the business rescue practitioner treat this creditor and their claim?

- (a) Because the creditor is a foreign business, it is not bound by the approved business rescue plan and its claim is not affected by the moratorium. The business rescue practitioner must settle the creditor's claim in full in the normal course.
- (b) The creditor's claim is preferent to the claims of other South African unsecured creditors and will rank ahead of them in terms of the payment waterfall.
- (c) The creditor's claim is treated the same as all other unsecured creditors, whether the creditor is foreign or South African, and whether it chose to vote on the business rescue plan or not.
- (d) Business rescue is a South African legal process aimed at trying to save financially distressed South African businesses and, as such, the claims of any foreign creditors are automatically fully expunged upon the commencement of business rescue proceedings.
- (e) If there are foreign-domiciled creditors, the business rescue practitioner must produce two business rescue plans - one to deal with local South African creditors and the other to deal with foreign creditors.

Question 1.13

Commented [M15]: 1 mark

Choose the **correct** statement:

The company in business rescue's body of creditors includes the following claims (which have been accepted):

- Bank A: owed R60m and a fully secured creditor;
- 20 separate trade creditors: collectively owed R5m and unsecured;
- SARS: owed R5m in relation to income tax owing pre-business rescue and unsecured;
- Related / Inter-company X: owed R15m and unsecured;
- Party Y: owed R15m and which claim is subordinated in favour of all other creditors (an independent liquidation calculation valued this claim at R0);

All the above creditors attend the section 151 meeting to vote on the business rescue plan. However, only Bank A and Party Y vote in favour of the plan, with all other creditors (trade creditors, SARS and company X) voting against the plan. Has the plan been validly voted in / approved?

- (a) No: SARS's claim should be considered to be preferent and hence any vote is incorrect because of this obvious classification error.
- (b) Yes: The plan is voted in by virtue of 75% of all creditors voting in favour thereof (of which at least 50% of the independent creditors' voting interests were voted).
- (c) No: The plan is not voted in due to less than 75% of all creditors voting in favour thereof (despite the fact that more than 50% of the independent creditors' voting interests were voted).
- (d) No: 24 individual creditors in number (not value) voted and there were only 2 parties who voted in favour, therefore those voting against the plan far outweigh those voting in favour.

Question 1.14

Choose the **correct** statement:

Whilst section 150(c)(iv) does not require a cash flow statement or cash flow projections, best practice suggests that a cash flow should be presented. If presented, such a cash flow statement could explain to the reader:

- (a) The expected revenue (income) and expenses of the company, including depreciation and amortisation.
- (b) How expected cash receipts and payments are forecast to be received and paid respectively, that is, the liquidity of the company.
- (c) The financial position of the company as at the date of publication of the rescue plan.
- (d) All of the above.
- (e) Both (a) and (b) are correct.

Question 1.15

Choose the **correct** statement:

Per the Companies Act 2008, for what duration should the projections (statement of income and expenses and balance sheet) be prepared for in the business rescue plan?

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Commented [M17]: 1 mark

- (a) Three years from the commencement of business rescue proceedings.
- (b) One year from around the date of publication of the business rescue plan.
- (c) Three years from around the date of publication of the business rescue plan.
- (d) Any amount of time - this is at the discretion of the business rescue practitioner.
- (e) Only for the duration of the proceedings until substantial implementation has been achieved.

Question 1.16

Commented [M18]: 0 marks

Choose the **correct** statement:

The business rescue plan can, once adopted, be "crammed down" on:

- (a) The secured and unsecured creditors.
- (b) Only those creditors and shareholders who voted in favour of its adoption.
- (c) The creditors and shareholders who were present at the meeting in which the plan was adopted.
- (d) The creditors and shareholders who were not present at the meeting in which the plan was adopted.
- (e) The company, its shareholders, and the secured and unsecured creditors, regardless of whether or not they were present, or voted in favour of adopting the plan.

Question 1.17

Commented [M19]: 1 mark

Choose the **correct** statement:

A motor-vehicle of a company in business rescue is valued at R100,000.00. The same vehicle is the subject of the security of X Bank, who are still owed R50,000.00 for financing the vehicle.

The business rescue practitioner wishes to sell the vehicle in the normal course of business as it is no longer required for the operation of the business. What is the correct course of action for the business rescue practitioner?

- (a) Always obtain the consent of X bank before selling any asset.

(b) If the business rescue practitioner is sure that the proceeds of the sale will be sufficient to settle the claim of X Bank, then he can sell the vehicle without their consent and simply pay what is owed to X Bank when he receives the sale proceeds for the vehicle.

(c) Simply sell the vehicle at the best possible price to his brother.

(d) All of the above.

Question 1.18

Commented [M20]: 1 mark

Choose the **correct** statement:

During the business rescue proceedings of any company the business rescue practitioner has to consider a vast number of statutory obligations that the company must comply with. With regard to employees' statutory rights as contained in the Labour Relations Act, which of the following statements is correct:

(a) The Companies Act 2008 supersedes the Labour Relations Act and therefore the only rights of employees during business rescue proceedings are contained in the Companies Act 2008.

(b) The business rescue practitioner must have regard to section 5 of the Companies Act 2008 in the general interpretation of the Companies Act 2008. The provisions of the Companies Act 2008 and the Labour Relations Act apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions of the two Acts, without contravening the second. However, to the extent that it is impossible to apply or comply with one of the inconsistent provisions of the two Acts, without contravening the second, then the Labour Relations Act will prevail in the case of any inconsistencies.

(c) The business rescue practitioner must discount the provisions of the Companies Act 2008 and only rely on the provisions of the Labour Relations Act.

(d) The business rescue practitioner may elect to consider either the Labour Relations Act or the Companies Act 2008, however both cannot be interpreted concurrently.

(e) none of the above.

Question 1.19

Commented [M21]: 1 mark

Choose the **correct** statement:

If determined necessary, commencing a section 189 retrenchment process (in accordance with the provisions set forth in the Labour Relations Act), would be of significant benefit to most companies that have commenced business rescue, as this process is one of the

primary ways in which a financially distressed company can reduce overhead costs and operating expenditure. In this regard, when should a business rescue practitioner commence a section 189 process?

- (a) As soon as possible after the commencement of business rescue and the business rescue practitioner's appointment as practitioner. It is often a vital process in business rescue and should thus be prioritised as a critical procedure to be undertaken as soon after the commencement of business rescue as possible.
- (b) The business rescue practitioner is required to call for a vote on their intention to commence a section 189 process and this vote should be called at the first meeting of creditors convened in terms of section 147 of the Companies Act 2008. If the vote is passed by the requisite majority of creditors of the company, the business rescue practitioner should commence a section 189 process immediately after the vote has been passed in the section 147 first meeting of creditors.
- (c) The business rescue practitioner is required to include provisions regarding their intention to commence a section 189 process in the business rescue plan that they publish. The business rescue practitioner can only commence a section 189 retrenchment process if the business rescue plan contemplates the company commencing the process and only if it is duly approved and adopted by the requisite majority of creditors. Thus, the business rescue practitioner should only commence a section 189 process after publication of the plan and subsequent to the business rescue plan being voted on, approved and adopted by creditors.
- (d) The business rescue practitioner is legally permitted to commence a section 189 process at any time from the date of commencement of business rescue, but it must be initiated, and the requisite section 189 consulting period must be concluded, prior to the substantial implementation of the business rescue plan.

Question 1.20

Commented [M22]: 1 mark

Choose the **incorrect** statement:

If a business rescue practitioner is not appointed within five (5) business days after commencement of a company's voluntary business rescue:

- (a) The business rescue proceedings immediately end.
- (b) The business rescue resolution lapses and is a nullity.
- (c) The business rescue proceedings are not affected unless a court sets aside the resolution.
- (d) Approval of the business rescue plan will automatically cure this procedural error.

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

CASE STUDY

Khusela Entertainment Proprietary Limited

Khusela Entertainment Proprietary Limited (**Khusela**) is a private company duly incorporated and registered as such under the applicable company laws of the Republic of South Africa (**South Africa**). Khusela has been operating as one of the largest record companies in South Africa for almost 30 years and has enjoyed great success and profitability through innovative branding, creative marketing and its management's ability to identify the latest trends in South African music and sign the greatest local talent. Leveraging off the influence and popularity of distinctively South African genres such as "Kwaito", "Gqom" and "Amapiano", Khusela has amassed a valuable catalogue comprising a multitude of well-known hits. Whilst Khusela's head office is located in Johannesburg, it operates recording studios in all major South African cities, including Polokwane, Durban, Pretoria, Mbombela, Bloemfontein, Gqeberha and Cape Town. For this purpose, Khusela has entered into various commercial lease agreements with Universal Properties Limited (**Universal Properties**), in terms of which studio space and recording equipment are leased from Universal Properties on a long-term basis. In order to facilitate artists' travel between the various recording studios, Khusela acquired a fleet of brand-new luxury mini-buses from Fast Cars Proprietary Limited under instalment sale agreements.

Over the past five years, Khusela has expanded rapidly in order to provide a complete service offering to its artists, music producers and promoters and consequently established a publishing division, an events management division as well as a record label called Soweto Music. As a result of this rapid expansion, Khusela incurred large amounts of high-interest debt by way of various financing arrangements with local banks and private equity firms. In addition to this, Khusela hired large amounts of employees in anticipation of increased demand resulting from its new service offerings. From having approximately 500 employees in 2015, Khusela's workforce (and its associated wage bill) quadrupled and comprised approximately 2,000 employees by the end of 2021. Khusela's employees are represented by the South African Entertainers Union (**SAEU**), a South African registered trade union that aims to safeguard the interests of musicians and entertainers, by advocating for fair labour practices and favourable working conditions for artists.

During the 2022 financial year, Khusela began to experience a substantial decrease in its operating revenue as a result of the following factors: (i) increased competition from new players in the South African music industry, (ii) the introduction of online platforms that allow artists to publish and distribute their music without the need to sign with a record label, and (iii) the increased tendency for up and coming artists to promote their music via social media platforms, as opposed to traditional means of marketing and promotion.

Due to the poor financial performance of Khusela during the 2022 financial year, Khusela's management went into panic mode and their immediate reaction was to pump additional capital into the business, in order to expand its service offering even further. As part of this capital-raising strategy, Khusela (i) entered into a revolving credit facility agreement with Crypto Bank Limited, in terms of which Khusela acquired a revolving credit facility in an aggregate amount equal to R100,000,000 against security in the form of a cession of book debts and a cession of all of Khusela's rights under its material distribution agreements, (ii) refinanced its existing debt (on more onerous and somewhat prejudicial terms) with Old Money Investment Corporation, a South African private equity firm, against the provision of additional security in the form of a mortgage bond registered over Khusela's head office and a deed of hypothecation over Khusela's registered trademarks, and (iii) initiated a rights offer in terms of which Khusela's existing shareholders acquired additional shares in the ordinary share capital of Khusela, and pursuant to which approximately R30,000,000 in additional equity was raised.

After acquiring additional capital to fund its business, Khusela's outlook in the short term seemed positive. However, it quickly became apparent to Khusela's Chief Financial Officer, Mr Kabelo Mogale and its Chief Executive Officer, Mr Themba Sithole, that whilst there was a noticeable increase in profits (as reflected in the latest management accounts), the likelihood of Khusela becoming overindebted in the long-term remained. For this reason, Kabelo and Themba set out to obtain legal advice from Best Law Inc on the options available to companies experiencing financial distress, as a precautionary measure. In particular, they wished to understand the entry routes into the South African business rescue process and the prescribed statutory requirements for each route.

In the midst of their financial uncertainty, and just as Khusela began to recover from its financial decline, a group of Khusela's biggest artists (and largest contributors of revenue), announced that they wished to leave Khusela's record label, reclaim their master rights, and go independent. This decision resulted in significant cash shortfalls given that Khusela experienced a substantial and unexpected reduction in its revenue streams. This "liquidity crisis" culminated in Khusela being unable to service its debt obligations and pay its overheads at the beginning of the year 2023. It then became clear to Khusela's board of directors that it appeared to be reasonably unlikely that the company would be able to pay its debts as they became due and payable in the ordinary course, and at this point, Khusela's draft financial statements indicated that the company's liabilities exceeded its assets.

Whilst Khusela's board of directors were contemplating the options available to them, the company was not able to pay its critical suppliers, landlords and its employees' salaries. As a result, certain creditors began taking legal action to recover the amounts owing to them, and in this regard:

- (i) Opera Sound Engineering Services Proprietary Limited (**Opera Sound Engineering**) issued a money judgment application in the High Court of South Africa KwaZulu-Natal Division, Durban against Khusela, in terms of which it claimed certain amounts owing by Khusela pursuant to repairs carried out by it at one of Khusela's studios;
- (ii) World of Music Proprietary Limited had begun preparing a liquidation application, on the basis that Khusela ought to be deemed to be unable to pay its debts;
- (iii) Fast Cars Proprietary Limited threatened to cancel the instalment sale agreements entered into with Khusela, as a result of Khusela's failure to pay instalments under the relevant instalment sale agreements; and
- (iv) In addition to the abovementioned legal steps, Universal Properties, one of Khusela's landlords and a creditor that was owed in excess of R20,000,000 in arrear rentals, sought legal advice and subsequently brought an application in the High Court of South Africa Gauteng Local Division, Johannesburg as an "affected person" to place the company under supervision and commence business rescue proceedings. In its business rescue application, Universal Properties nominated Ms Sarah van Zyl (a senior practitioner) for appointment as the business rescue practitioner of Khusela. After considering the business rescue application brought by Universal Properties, the High Court granted an order placing Khusela into business rescue and made a further order appointing Ms Sarah van Zyl as interim business rescue practitioner.

In light of the fact that salaries remained unpaid for a substantial period of time, and given that Khusela was subsequently placed into business rescue, the employees of Khusela were uncertain about what they could expect and wished to obtain the following legal advice:

- (i) whether their position in business rescue was more advantageous than if Khusela was put into liquidation;
- (ii) whether they (as employees) have any statutory rights to participate in the business rescue proceedings;
- (iii) a breakdown of the status of their claims in respect of unpaid salaries (both pre-business rescue and post-business rescue), in terms of the provisions of the Companies Act 2008 (**Companies Act 2008**);
- (iv) whether the business rescue practitioner may unilaterally amend and vary their employment terms and conditions; and
- (v) whether they may be validly retrenched in terms of the applicable labour laws of South Africa read with the Companies Act 2008.

The employees of Khusela obtained a detailed legal opinion from insolvency and restructuring law experts on the aforementioned issues.

Following her appointment, Ms Sarah van Zyl immediately assumed full management control of Khusela and scheduled a first meeting of creditors. At the first meeting of creditors, Ms Sarah van Zyl's appointment was ratified in the manner prescribed by the Companies Act 2008 and thereafter she began to investigate the affairs of Khusela, with the view of developing a business rescue plan.

During the course of Sarah's investigations, she was approached by Themba Sithole (the CEO of Khusela) who informed her that he had previously bound himself as surety for the debts of Khusela under the initial funding transaction entered into with Old Money Investment Corporation in the year 2019. Themba was curious to know whether his obligations under the deed of suretyship had been extinguished by virtue of the fact that Khusela was placed into business rescue proceedings. Sarah addressed a letter to Themba setting out the status of Themba's obligations under the deed of suretyship in light of relevant case law.

In relation to the various contracts concluded by Khusela with its various suppliers and landlords (prior to the commencement of business rescue proceedings), Sarah was uncertain as to whether she was able to suspend and / or cancel prejudicial contracts. She recalls from legal advice that she obtained previously that the Companies Act 2008 gives business rescue practitioners the ability to suspend or cancel prejudicial contracts, but she is uncertain as to how this may be done practically. Consequently, Sarah reached out to Best Law Inc and requested them to prepare a brief legal opinion dealing with the suspension or cancellation of prejudicial contracts in the business rescue context.

Following her investigations into the business and affairs of Khusela, Sarah was of the view that Khusela was capable of being rescued, particularly in view of Khusela's established brand and goodwill that it has in the South African music industry. She immediately sets out to secure post-commencement financing to keep the company afloat, whilst Khusela's business rescue plan was being prepared and drafted for consideration by creditors.

The business rescue plan of Khusela was eventually published a year after Sarah was appointed as the business rescue practitioner. The business rescue plan was subsequently put to a vote at a meeting of creditors held in terms of section 151 of the Companies Act. The business rescue plan of Khusela was supported by the requisite majority of creditors and was finally adopted.

Opera Sound Engineering, a minority creditor, voted against the adoption of the business rescue plan, as its board of directors was of the view that there were no reasonable prospects of Khusela being rescued. The board of Opera Sound Engineering was further of the view that the approved business rescue plan was not binding on Opera Sound Engineering at all, given that it had voted against the adoption of the business rescue plan.

Sarah proceeded to implement Khusela's approved business rescue plan. The business rescue proceedings of Khusela continued over a prolonged period of time and eventually it became clear that the business rescue plan was not capable of being implemented in its initial form. Sarah consequently amended Khusela's business rescue plan unilaterally and circulated a notice to creditors informing them of such amendments. The provisions of the amended business rescue plan were prejudicial to the interests of Crypto Bank Limited and Old Money Investment Corporation. Accordingly, both Crypto Bank Limited and Old Money Investment Corporation initiated joint legal proceedings to have Sarah removed as the business rescue practitioner. The application to remove Sarah as the business rescue practitioner was unsuccessful.

Ultimately, despite the best efforts of Ms Sarah van Zyl and Khusela's board of directors, it was determined that Khusela was not capable of being rescued. Accordingly, Ms Sarah van Zyl proceeded to take the necessary steps to place Khusela into liquidation.

Question 2

It is recorded in the case study that "certain creditors began taking legal action to recover the amounts owing to them". Briefly discuss the enforceability of legal proceedings in light of Khusela's ongoing business rescue proceedings. (2)

Due to the fact that Khusela was in a business rescue process in terms of Chapter 6 of the Companies Act 2008, the company would be afforded the protection of the general moratorium.

S133(1) of the Companies Act 2008 states 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", unless the written consent of the practitioner has been obtained with the leave of the court.

As such the legal actions that are being taken against Khusela will be stayed in light of the business rescue and will continue for the duration of the business rescue, and can extend beyond the business rescue process subject to the requirements set out in S150(2)(b)(i).

Note must also be made that where there were any of the claims subject to a time limit, under S133(3) the respective time limit will be suspended during the business rescue proceedings.

Question 3

What is the requisite majority of creditors' support that is required for a business rescue plan to be adopted? (3)

Commented [M23]: 2 marks out of 2.

Commented [M24]: "unless the written consent of the practitioner has been obtained OR with the leave of the court."

Commented [M25]: 3 out of 3 marks. Excellent answer.

In accordance with S150(1), of the Companies Act the business rescue plan proposed by the business rescue practitioner will be considered at a meeting held in terms of S151 read together with S152 and S153.

S152(2) provides that the proposed business rescue plan will be put into vote by the creditors and if applicable the shareholders S152(1)(a). The business rescue plan will be preliminary approved on the following basis:

- (a) it was supported by the holders of more than 75% of the creditors' voting interest that were voted; and
- (b) the votes in support of the proposed plan included at least 50% of the independent creditors voting interest, if any, that were voted.

If the plan furthermore, does not affect the rights of the holder of any class of securities under S152(3)(b) the approval of the plan in accordance with the above requirements, will constitute the final adoption of the plan, subject to the satisfaction of any condition's precedent.

However, if the rights of any class of holders are affected. The practitioner will be required to hold a meeting with the holders of the specific class, or classes of securities whose rights will be affected/changed, and call for a vote by them to approve the adoption of the proposed business rescue plan. If the majority of the holders of the specific class, or classes vote in favor of the business rescue plan. The plan is considered final and adopted, subject only to the satisfaction of the contingent considerations noted in the plan.

Question 4

It is mentioned that Opera Sound Engineering voted against the business rescue plan. Is the approved business rescue plan binding on Opera Sound Engineering? Substantiate your answer with authority. (3)

Under S152(4) of the Companies Act 2008 it is stated that the business rescue plan will be 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

- (a) Was present at the meeting
- (b) Voted in favour of adoption of the plan; or
- (c) In the case of creditors, had proven their claims against the company

Therefore, the plan will be binding whether or not Opera Sound Engineering voted for or against the adoption of the plan. Opera sound will therefore not be able to enforce any debt owed to them except to the extent that it has been provided for in the plan.

Question 5

Considering the fact that Khusela was already unable to pay its debts at the time of the application to place it in business rescue, explain whether the requirement of financial

Commented [M26]: 3 out of 3 marks.

Commented [M27]: 1 mark out of 5. Needed to discuss the requirement of financial distress with reference to applicable case law.

distress as defined in the Companies Act 2008 was met, or whether it was too late for a business rescue order to be issued. (5)

Under S128(1)(F) a financially distressed company at any particular time means a company that appears to be reasonably unlikely to be able to pay all of its debts as they fall due and payable within the immediate ensuing six months, or it appears reasonably likely that the company will become insolvent within the immediate ensuing six months. Therefore, under the circumstances, it appeared that S128(1)(f)(i) was progressing towards reasonable uncertainty, and would potentially be considered as financially distressed, read together with S128(1)(f)(ii) and due to the fact that the draft financial statement showed that the companies liabilities already exceeded its assets, it is reasonable to assume that the requirements under the S128 would have been met and the company would have been considered as Financially distressed.

The question as to whether it was too late for the business rescue to be ordered or not comes down to the purposes of business rescue. As the business rescue proceedings have been established to facilitate the rehabilitation of a company that is financially distressed. This rehabilitation and its purpose can be broken down into two main categories:

- 1) The development and implementation of a plan (If approved) to rescue the company by restructuring its affairs, business, property, debt, and other liabilities, and equity in a manner that will maximize the likelihood of the company continuing in existence on a solvent basis, or;
- 2) If not possible to achieve the requirements above, result in a better return for the company's creditors or shareholders than would from immediate liquidation of the company.

As such even though the company was already "Commercially" insolvent and late to settle some of their debts, the delay in the implementation of the business rescue does not deem the process of business rescue to be too late. The assessment of whether the company will meet the requirements of business rescue will determine whether business rescue is indeed the correct path over a liquidation proceeding, the delayed implementation may rather indicate that management and the directors had insufficient monitoring controls in place, which potentially delayed the process of business rescue and made it an unviable option.

Question 6

What effect - if any - would the application for Khusela to be placed in business rescue have on the application by World of Music for the company to be placed in liquidation had this application (for liquidation) already been filed at the High Court at the time? (5)

Due to the fact that the application to initiate the business rescue proceeding was initiated by Universal Properties as an affected person and no resolution had been contemplated as per S129 (Resolution by Directors). S131(1) of the Companies Act 2008, will be required to be assessed as the court application was brought forth by a connected person.

Commented [M28]: 1 mark out of 5. Needed to discuss relevant case law ie. Lutchman NO v African Global Holdings, ABSA Bank Limited v Summer Lodge and Standard Bank of South Africa v A-Team Trading CC. Also needed to mention that the issue for consideration is whether a pending liquidation application should be regarded as part of liquidation proceedings prior to the application being heard in court.

Under S131(6) it is stated that if a liquidation proceeding had already been commenced against the company at the time of the application for business rescue, the business rescue application will suspend the liquidation proceedings until:

- a) The court has adjudicated upon the application; or
- b) The business rescue proceeding ends, if the court makes the order applied for.

Therefore, the application to place the company in business rescue will temporarily suspend the liquidation proceedings. The court is empowered under S131(7) of the Companies Act to place a company into business rescue at any time during the course of any liquidation proceedings this was confirmed in *Van Staden v Angel Ozone Products*. The court concluded that "if the rescue proceedings are a better option than the liquidation proceedings, I see no reason why such liquidation proceedings cannot be converted into supervision and rescue proceedings irrespective of how far advanced the liquidation or the winding-up proceedings might be".

An additional consideration to the effect of the conversion would be that if the process of liquidation had already commenced the company would not be able to operate until such time that the application to court has been proceeded on and an outcome provided. This could decrease the effectiveness of the business rescue process.

An additional effect would be that the liquidators' fees and any amounts outstanding to him or her for any remuneration for work performed would be added to the list of creditors that will need to be assessed in the business rescue plan. This was confirmed in the SCA, in *Ritcher v Absa Bank*.

Question 7

In addition to the cession of books debts in favour of Crypto Bank, it also insisted and thereafter registered a general notarial bond over the movable assets of Khusela.

Ms Sarah van Zyl identified a large amount of redundant equipment and even a few unroadworthy old vehicles that could be sold urgently in order to fund the ongoing operation cost of Khusela during business rescue.

Crypto Bank came to hear of Sarah van Zyl's intention to sell these assets and addressed a letter to her via their attorneys threatening to launch an urgent Court application to interdict her from selling the assets subject to their security, without their consent.

Question 7.1

Sarah Van Zyl approaches her lawyers at Best Law Inc for advice on what the legal position of Crypto Bank with regard to the general notarial bond, and her prospects of success in opposing the threatened urgent application. As an experienced lawyer at Best Law Inc advise Sarah van Zyl on whether or not she is entitled to sell the assets in question without Crypto Bank's consent. (2)

Commented [M29]: 1 mark out of 2. See page 75 of the Course Notes.

A distinction needs to be made between the different forms of security that is being held by Crypto Bank. Crypto Bank has a revolving credit facility with a cession of book debts and a cession of all Khusela's rights under its material distribution agreement additionally the registered notarial bond over movable assets. As the assets that form part of the proposed transaction relate to vehicles and redundant equipment, the only security that falls within the scope of this transaction would be the General Notarial bond.

A general notarial bond will only confer preference in the event of a liquidation, therefore the assets subject to the general notarial bond are in essence unsecured under a business rescue process. As long as Sarah adheres to the requirements set out below in regard to S134 of the Companies Act 2008 Sarah is entitled to dispose of the assets and the interdict would hold no grounds.

Under S134 the company may dispose of the property if the disposal is made in the ordinary course of its business, or in a bona fide transaction at arm's length for fair value approved in advance by Sarah or alternatively in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of S152. Therefore, as long as the disposal has been made either as part of the business rescue plan or by the directors in a bona fide transaction at arm's length either set out in the plan or approved by Sarah, Sarah is within her rights to dispose of the assets.

Question 7.2

If Sarah van Zyl is in a position to sell the assets, what would the requirements for such disposal be? (4)

This transaction would not constitute a transaction in the ordinary course of business for Khusela under S134(1)(a)(i). Sarah would therefore have to consider whether the proposed transactions would be considered bona fide, at arm's length, and for value.

Taking into consideration that the equipment was considered redundant, and some of the vehicles were even unroadworthy and the proposed sale is to provide funding for the ongoing operational costs it is likely that the requirement would be met in terms of S134(a)(ii).

Due to the fact that these vehicles are no longer being used in the ordinary course of the business and that there are a few that cannot be used even if the need arose, it is likely that the sale of these assets is a reasonable procedure within the process. Especially considering that the proceeds are to fund the operations, there would be no significant need to process the sale through S134(a)(iii) the business rescue, and the sale would be seen as necessary in the ordinary course.

Question 8

Commented [M30]: 3 marks. Marks awarded for referring to section 134 and discussing the ordinary course of business/bona fide requirement.

Commented [M31]: 4.5 marks. Needed to state that "security could be provided for the amount of the proceeds to the reasonable satisfaction of Crypto Bank".

Sarah Van Zyl approaches Easy Access PCF, a well-known provider of funding to distressed businesses, for a loan to fund the expected operational losses during the business rescue. After a short due diligence, Easy Access PCF indicate that they are willing to provide post-commencement funding of R1,000,000 subject to Sarah agreeing to sell to them the proceeds of Khusela's existing material distribution agreements and the proceeds being paid to them directly until such time as the post commencement finance is repaid in full.

Advise Sarah van Zyl under which circumstances she can agree to Easy Access's requirements considering that the rights to these agreements have already been ceded to Crypto Bank. **(5)**

With regard to the scenario highlighted it is necessary to identify whether the distribution agreement is seen as a property or not. Under the Companies Act 2008 there is no clear definition of property interest, therefore the common law definition should be considered where the Material distribution agreement will be seen as an asset within the company. Ceding the right of recovery of the proceed to Khusela's agreement with further constitute an agreement of disposal of these agreements. As such the requirements that are set out in S134 of the Companies Act would need to be adhered to should Sarah which to sell the right.

Due to the fact that the material distribution agreements have already been ceded to Crypto Bank, Crypto Bank will hold the security over these agreements. As such S134(3) would apply and Khusela would therefore need to obtain the prior consent of Crypto Bank this has been confirmed in South Gauteng High Court in the matter of Van den Heever No and Others v Van Tonder.

Due to the fact that the proceeds from the sale of the agreements will be utilized to settle the PCF, there will be no manner in which Sarah could circumvent obtaining the approval of Crypto Bank, as the disposal will not be used to fully settle the Crypto Banks debts either partially or fully in a prompt manner. In the matter of Louis Pasteur Holdings (Pty) Ltd and Others v Absa Bank Ltd and Others the Supreme Court of Appeal held that the period payment that may eventually discharge the debt owing will not comply with the requirement from the prompts repayment set out in S134(3)(b).

Additionally, the courts have held under Gromley v West City Precinct Properties (Pty) Ltd 2013 JDR 1895 (WCC) that the rental stream related to the maintenance agreements has been ceded to the bank as security. These rental streams do not belong to the company, the ownership of these streams would have passed to Crypto Bank, and Sarah cannot circumvent the provisions of S134.

Sarah would therefore need to convince Crypto Bank to approve the proposed transaction and cede the collection of the revenue to the Easy Access PCF funder, this has been confirmed in the Kritzinger and Another c Standard Bank of South Africa Ltd

Only once the aforementioned approval has been received can Sarah determine whether the disposal will meet the requirements in S134. The company may dispose of the

agreements

only;

i) if the disposal is done in the ordinary course of the business.

Under the circumstances the disposal of the right would not constitute a disposal made in the ordinary course of business, therefore this clause is not met.

ii) in a bona fide transaction at arm's length for fair value approved in advance and in writing by the practitioner.

The sale of the material agreement will be made at arm's length, as this would be made to the usual customers, the proceeds of which will be collected by Easy Access PCF. This will therefore meet the requirements of this clause. The third option available may not be met as the PCF is to be provided before the business rescue plan will be approved.

Under the considerations of the above transaction, there is a further need for Sarah to continuously assess whether or not there remains a reasonable prospect of the company being rescued. As if there is no longer a reasonable prospect it would be improper to consent to the disposal, even if the above has been met and the disposal is at fair value.

Question 9

The business rescue practitioner of Khusela Entertainment (Pty) Ltd was faced with a workforce of over 2,000 employees at the commencement of the business rescue proceedings. Within the first week of business rescue proceedings having commenced, the business rescue practitioner identified the need to embark on a retrenchment process with more than fifty percent (50%) of the employees of Khusela Entertainment (Pty) Ltd, for operational considerations. The business rescue practitioner, being a prudent and careful business rescue practitioner, immediately embarked on a section 189 consultative process with the affected employees of Khusela Entertainment (Pty) Ltd, in terms of the relevant provisions of the Labour Relations Act. The first consultation took place two weeks after the commencement of business rescue proceedings, with the various consultative meetings taking more than 60 days to complete and, eventually, more than 1,500 employees of Khusela Entertainment (Pty) Ltd were retrenched for operational considerations during the business rescue proceedings.

Commented [M32]: 4 marks out of 7. Needed to state that the status and rights of employees in a business rescue process are entrenched in chapter 6 of the Companies Act, subject to the provisions of applicable labour laws. Needed to describe what the section 189 process entails. Needed to state that the BRP could issue voluntary severance offers to all affected employees, subject to any collective agreements.

Despite the negative impact this had on the employees who were retrenched, the business rescue practitioner ensured that the cash flow for the business was restored to a manageable level for the business, the employees were paid their severance packages, and the business rescue practitioner felt that the correct decisions were made pursuant to the consultative process with the employees.

This retrenchment process and the resultant cash flow relief paved the way for the business rescue practitioner to draft the proposed business rescue plan, which was published after the section 189 process was finalised.

In light of the rights of employees and the current case law on this subject, discuss whether the business rescue practitioner followed the correct process and procedure in this case.

(7)

Under the Companies Act S7(K) provision is made for the efficient rescue and recovery of a company in business rescue (Financially distressed). The provision sets out to balance the rights and interests of all the relevant stakeholders of the company including the rights of the employees and their representative unions. Therefore, in considering whether the acts taken by Sarah and the process which was followed, specific consideration should be given to whether the process would be seen as balanced under S7(K) and constituted a fair and equitable termination in accordance with the act.

In the information provided, it is clear that the process of retrenchment was commenced before the draft business rescue plan was created. Under S136(1)(a) under the business rescue proceedings the employees of the company immediately before the beginning of the proceedings will continue to be employed by the company on the same terms and conditions before the company entered into business rescue. Except to the extent that changes occur in the ordinary course of attrition or the employees and the company agree on different terms and conditions in accordance with the labour laws.

S136(1)(b) sets out that any retrenchment that is done as part of the business rescue plan is subject to the requirements of S189 and 189A of the Labour Relations Act, 1995.

The requirements that are set out in S189 of the Labour Relations Act 1995 state that the consultation related to the retrenchment is one that must be commenced at any time that the rights of the employees may be affected. It is clear from the information provided Sarah undertook the consultative process and provided sufficient consultation through the 60-day process that was embarked on with the employees. Under the information provided it is unclear whether the consultative process was sufficient in scope due to the fact that the employees of Khusela are members of a registered trade union SAEU. Under S144 of the Companies Act 2008 it is clear that any employee of the company that is represented by a registered trade union, the business rescue practitioner will be required to ascertain whether there are any collective agreements in place to determine whether the use of a collective agreement may assist in the retrenchment. The consultative process followed by Sarah should have ensured that sufficient involvement and participation of the trade union was incorporated. In the given information this is unclear as to the extent of the

communication and interaction with the unions, but failing this would constitute the failure to satisfy the requirements of S7(K) noted above as the view may not represent a balanced view.

It is further unclear as to whether the employees were afforded the opportunity to form an employee representative committee in terms of S148 at the first meeting of employees or any time throughout the business rescue proceedings. Failing this would additionally result in Sarah not fully adhering to the requirements in the Companies Act, as the consultation process would need to incorporate the Employees representative committee.

The requirements of the Labour Relations Act were tested in the case of South African Airways SOC Ltd and Others v National Union of Metal Workers of South Africa obo members and Others where the court found that S136(1)(b) requires that any retrenchment contemplated needs to be dealt with in the business rescue plan, and that there is no provision under business rescue that empowers the business rescue practitioner to retrench the employees in the absence of a business rescue plan. As such it may appear that the process of retrenchment may have been premature.

Under the facts provided it appears that even though Sarah undertook the S189 process and was in agreement with the employees of the company, there are certain instances where it appears Sarah did not fully comply with the requirement of the labour relation Act read together with the Companies Act. The process Sarah followed appears to result in a process that would not constitute a balanced approach, and the implemented timing of her actions was in contravention of the precedent set out in Case Law.

As such the affected employees under S136(3) may assert a claim against the company for any damages that may have been faced, and the affected employees may approach the Labour Court for relief if they believe that their dismissal was untoward.

Question 10

Commented [M33]: 3 marks.

Discuss the general rights held, if any, by the employees of Khusela during the business rescue process of Khusela. (3)

Under the Companies Act 2008 an employee is considered an affected person in the business rescue process. Under S144 a provision is made regarding the right of the employees during business rescue and will apply to any employee of the company, every registered trade union representing any employee of the company, and any employee who is not represented by the union is entitled to;

144(3)

- (a) Notice of each court proceeding, decision, meeting, or other relevant event concerning the business rescue proceeding.
- (b) Participate in any court proceedings arising during the business rescue proceedings
- (c) The right to form a committee of employee representatives

- (d) Be consulted by the practitioner during the development of the business rescue plan, and afforded sufficient opportunity to review any such plan and prepare a submission.\
- (e) Be present for the submission of the business rescue plan
- (f) Vote on a motion to approve a proposed business rescue plan, to the extent that the employee is a creditor
- (g) If the proposed plan is rejected have the ability to propose the development of an alternative plan, or present an offer to acquire the interest of one or more affected persons in the manner set out in S153.

Any medical scheme or a pension scheme including a provident scheme for the benefit of the past or present employees of the company would also constitute an unsecured creditors claim if there was any unpaid amount in relation to these schemes' pre-business rescue.

Additionally, S 135(1) of the Companies Act deals with the remuneration and reimbursement of expenses or other amounts relating to the employment that become due and payable by the company to an employee during the business rescue proceedings. These amounts will be regarded as post-commencement finance, and will be paid out in accordance with 135(3)(a), these claims will enjoy preference over all other post-commencement finance claims, irrespective of whether secured or not. This order of preference with regard to the employees will continue to apply even if the company eventually liquidates.

Question 11

Discuss whether Mr Themba Sithole (the Chief Executive Officer), (ii) Mr Kabelo Mogale (the Chief Financial Officer) and (iii) the board of directors would have had any role during the business rescue process of Khusela. **(3)**

Under business rescue, the directors of the company must continue to exercise their duties and functions as directors under S66 of the Companies Act 2008. Their roles will however be subject to the authority of the business rescue practitioner. As directors they will additionally remain bound by the requirements of section 75 of the Companies Act 2008, to the extent that they act according to the business rescue practitioner authority, they will be relieved of the duties and liabilities as set out in S76 and S77, other than S77(3)(a), (b) and (c).

The directors of the company have a statutory duty to cooperate with and assist the business rescue practitioner and must attend to all reasonable requests of the business rescue practitioner, they are required to provide information about the company affairs, as soon as possible after the commencement of business rescue deliver Sarah all of the company's books and records that may be in their possession. As well as provide Sarah with a statement of affairs detailing any material transaction of the company within the previous 12 months.

Commented [M34]: 2 marks. Needed to apply the law to the facts i.e. that the directors must cooperate with and act in accordance with the instructions of Sarah van Zyl.

In the case *Ragavan v Optimum Coal Terminal (Pty) Ltd* it was confirmed that the Companies Act gives the business rescue practitioner full management control of the company. The board of directors will retain the governance functions, but it is a neutral function far removed from full management control, as such the directors cannot perform significant acts without the approval from the business rescue practitioner. The board of directors are therefore not absolved of their duties as directors of the company and may be required to perform certain tasks such as the disposal of property, but their task will be significantly limited in comparison and will require the approval of the business rescue practitioner.

Question 12

Commented [M35]: 5 marks.

Ms Sarah Van Zyl would have had an obligation to consult with creditors, other affected persons, and the management of Khusela before preparing a business rescue plan for consideration. With reference to case law, what should the term "consultation" entail in this context? (5)

The court case that set out a clear distinction of the term consultation was the matter of *Scalabrini Center Cape Town and Others v Minister of Home Affairs and Others* where the court held that:

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

Consultations is not to be treated perfunctorily or as a mere formality. This means 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 only be one which enables consultation in the substantive sense to occur."

Sarah is therefore required to not only inform the affected persons and will be obligated to have proper engagement with the affected persons, where all the different perspectives and views should be heard and taken into consideration before finalizing the business rescue plan. The mere informing of the process and the procedural occurrences will not constitute a consultation, this has been confirmed in *Hlumisa Investments Holdings (RF Limited and Another) v Van der Merwe NO and Others*.

The Consultation of the affected persons should be performed prior to the development and publication of the business rescue plan. This is a requirement to ensure that a balanced outcome is achieved through the business rescue plan as prescribed by section 7(k) of the Companies Act 2008. The consultation process will ensure that Sarah has sufficient understanding and view of all affected persons, this will allow her to derive a plan that takes into consideration all inputs provided and will allow for the formation of a plan with a higher probability of being adopted. Therefore, a details consultation process will also

procedurally assist Sarah in the formation and adoption of a more robust encompassing plan.

Question 13

Discuss whether Ms Sarah Van Zyl could propose an agreement with Khusela providing for further remuneration in addition to what is permitted by the government-regulated tariff, and who would have to approve such proposal? **(2)**

The remuneration of the practitioner is dealt with under S143 of the Companies Act, read with regulation 128,127(2) and 26(2) of the Companies Regulation 2011. Under S143(2) it states that the practitioner may propose an agreement with the company to charge further remuneration in addition to the remuneration as stipulated in the aforementioned sections, and will be calculated on the basis of a contingency. The contingency should relate to either the adoption of a business rescue plan at a particular time on completion of a particular matter stipulated in the plan, or the attainment of any result or combination of results relating to the business rescue proceedings.

This agreement will be final and binding on the company if it has been approved by a majority of the creditors voting interest, in accordance with S145(4) and (6), well as the approval of the majority of the shares with a voting right that entitle the shareholders 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.

Question 14

Is Khusela Entertainment a small, medium or large company, and what is the tariff rate per hour that Ms Sarah van Zyl can charge for her services as business rescue practitioner? Base your answer on the information provided and assume no significant changes between the dates set out in the case study and the date of commencement of business rescue. **(3)**

In determining the size of the company regulation 127(2) and 26(2) should be considered, which sets out the requirements for the calculation. Where a company scores below 100 points, this will be considered a small company between 100 and 500 points will be considered Medium-sized, and greater than 500 points would be considered a large company.

Applicable Requirement	Points Allocated	Khusela
A number of points equal to the average number of employees during the financial year.	1 Point per Employee	2,000
Third-Party Liability at the Financial Year End	1 Point for every R1 million	120 (RCF + Arrear Rental) +

Commented [M36]: 2 marks.

Commented [M37]: 2 marks. Needed to deal with the amount that Sarah could charge in terms of the tariff.

Turnover of the company during the financial year	1 Point for every R1 million	? +
Persons having a beneficial interest in the companies issued Securities.	1 Point per individual	Every 30+

Based on the above and the limited information provided in the case study, it is clear that solely on the number of employees hired by Khusela, will result in the company being considered as a large entity. As the company exceed the 500-point mark and is in the upper category on the size scale.

Question 15

Commented [M38]: 3 marks.

The case study includes the following statements:

“At the first meeting of creditors, Ms Sarah van Zyl’s appointment was ratified in the manner prescribed by the Companies Act and thereafter she began to investigate the affairs of Khusela.”

and

“Following her investigations into the business and affairs of Khusela, Sarah was of the view that Khusela was capable of being rescued.”

Read together these statements indicate that Sarah may not have complied with the Companies Act 2008 in performing her duties as the business rescue practitioner of Khusela Entertainment. Identify the section of the Act that may not have been complied with and explain why and what should have been done differently. **(3)**

Under the Companies Act it is clear that the business rescue practitioner should investigate the affairs of the company as soon as practicably possible after being appointed. This is to ensure that there is sufficient assessment performed with regard to establishing whether there is a reasonable prospect of rescuing the company.

Under the fact provided it appears that Sarah had been formally approved at the first meeting of creditors and only thereafter did she begin the process of investigating the affairs of the company. In general, the investigation of the affairs of the company should be performed prior to the commencement of the business rescue and the business rescue practitioner should perform an assessment as to whether the company may be a candidate for business rescue before accepting the position as a practitioner.

At the first meeting of creditors, Sarah should have an understanding of whether the company has a reasonable prospect of being rescued or not, as this is one of the requirements of the meeting under S147(1)(a)(i). Under the circumstances provided in making this statement as required by S147 and not performing her duties sufficiently as

noted in S141, will be a breach of office in accordance with S139(2)(a) and (b) and may be considered to be a reckless act.

Question 16

The business rescue plan was published almost a year after the commencement of business rescue proceedings. The delay would have triggered a number of duties or obligations on the business rescue practitioner. List these and identify the relevant section of the Act that creates the obligation or duty. (4)

In accordance with S150(5) of the Companies Act 2008, the business rescue plan must be published within 25 business days after the date on which the practitioner was appointed, this time could have been extended by either a court application by the company or a vote of the holders of a majority of creditors' voting interests. Therefore, Sarah as a business rescue practitioner would be obliged to adhere to the above duties on realizing that the prescribed time period was insufficient. The simplest route for Sarah would be to initially table the extension with the stakeholders noting the insufficient timing (Especially considering the size of the company), to allow her some breathing room in terms of the procedural requirements.

Under S132(3)(a) it is stated that where a company business rescue proceedings have not ended within three months after the start of the proceedings, or such time as the court, on application may allow the practitioner must:

- a) Prepare a progress report on the business rescue proceedings, and update it at the end of each subsequent month until the end of the proceedings, and
- b) Deliver the report and each update in the prescribed manner to each affected person and to the court in the case of Khusela and the proceedings were initiated by court order (To the commission in any other case).

Therefore, Sarah was unable to obtain approval for the extension or where the extension was insufficient to cover the full duration of the business rescue through court approval. Sarah will be obliged to submit monthly progress reports to all affected persons, outlining the progress of the business rescue proceedings.

Question 17

Mr Sandiso Siwisa, who is the cousin of the one of the directors of Khusela, owns 25% of the issued share capital of Khusela. Mr Siwisa's half-sister, Mrs Lungi Phillips, owns 26% of the issued share capital of Khusela. There is only one class of shares and each share affords a shareholder one vote.

Mr Siwisa is also a creditor of Khusela by virtue of a R500,000 loan made to Khusela when it urgently needed cash during 2022.

Is Mr Siwisa an independent creditor of Khusela? Provide full reasons for your answer. (5)

Commented [M39]: 4 marks.

Commented [M40]: 3 marks. Needed to discuss sections 2(1)(b) and 2(a)(ii) of the Companies Act. Needed to demonstrate why Mr Siwisa is not an independent creditor with reference to the exercise of a majority of voting rights etc.

In terms of the Companies Act an independent creditor is defined as a creditor of the company, including an employee who is a creditor in terms of S144(2); and not related to the company, a director, or a business rescue practitioner, subject to S128(2) of the Companies act.

Due to the fact that Mr Siwisa is not an employee of the company S128(2) will not apply.

Under S1 of the Companies Act 2008 the term "Related", when used in respect of two persons, means persons who are connected to one another in any manner contemplated in section 2(1)(a) to (c). Under S2(1)(a) it states that an individual is related to another individual if they:

- i) Are married, or live together in a relationship similar to a marriage; or
- j) Are separated by no more than two degrees of natural or adopted consanguinity or affinity

By virtue of the fact that Mrs Phillips who owns 26% of the issued share capital of Khusela, and is Mr Siwisa's half-sister, the definition of related would be met and Mr Siswa would not be seen as an independent creditor.

In the context provided it is insufficient to determine what "Degree" of cousin the director of the company refers to. As in accordance with S2, the degree of separation is prohibited to two degrees. Therefore, if the two are first cousins this would be in breach of the requirements and the two would be seen as related and not independent. However, if they were second or third cousins this by definition would not constitute a related party.

S2(3) provides that a person may be exempt from the application of the aforementioned provisions, if they are able to show that, in respect of the matter in consideration, there is sufficient evidence to conclude that the person acts independently of any related or inter-related person. Where this can be sufficiently proved, the parties in question may be seen as independent in relation to the transaction.

However, under the given circumstances it is unlikely that Mr Siswa will be able to prove that he is independent from both his half-sister and his cousin.

My Siswa should also consider that the proof of independence will not only be required to be assessed through the legal definition of independence but will also be assessed according to the perceived independence should any matter be called into court related to the independence.

Question 18

Comment on the validity of the business rescue practitioner, Sarah van Zyl, having the "ability" to unilaterally amend the business rescue plan. Also discuss the requirements of implementing an amendment to the business rescue plan with reference to the Companies Act 2008 and appropriate case law. (8)

Commented [M41]: 5 marks out of 8. The process described in your answer is that contemplated under (i) section 152 when a plan is being considered and there is a motion to revise/amend the plan, and (ii) section 153 when there has been a failure to adopt a BR plan. The answer required consideration of an instance where an already adopted plan is unilaterally amended by the BRP.

Under the circumstances provided it is evident that post the implementation of the original agreed-upon business rescue plan Sarah Unilaterally amended the business rescue plan. In accordance with the case law as set out in *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd*, the court held that a business rescue practitioner cannot unilaterally amend the business rescue plan and circumvent the procedures set out in the Companies Act 2008.

In practice, it is possible for the business rescue practitioner to provide amendments to the business rescue plan, as it is unlikely that the plant will proceed without slight differentials. However, these provisions (Which is silent within the text whether these provisions were provided for), should not permit the business rescue practitioner to make unilateral amendments, or attempts to circumvent the procedures under S152, S145, and S146 of the Companies Act 2008.

The unilateral amendment will therefore be void and in contravention of the Companies Act, as such Crypto Bank and Old Money Investment Corporation will have sufficient grounds for removal under S139(2) on either of the following grounds:

a) **Incompetence or failure to perform duties.**

Sarah as appointed business rescue practitioner should understand and adhere to the requirements as set out in the Companies Act. The Unilateral amendment of the plan without sufficient procedural adherence would constitute a failure to sufficiently perform her duties as a practitioner.

b) **Failure to exercise the proper degree of care in the performance of the practitioner functions**

Sarah should have fully complied with the requirements in the Act and ensured that all the procedures required in order to amend the business rescue plan were sufficiently adhered to.

c) **Engaging in illegal acts or conduct**

The unilateral alteration of the plan is in direct conflict with the requirements of the Companies Act and may constitute an illegal act, to the detriment of Crypto Bank and Old Money Investment Corporation.

Under the Companies Act 2008 the amendment of the business rescue plan the business rescue practitioner will be required to conduct a vote (simple majority) on any motions to amend the proposed business rescue plan, in any manner moved and seconded by the holders of creditors voting interest (Including those shareholders whose instruments may be affected by the change in the plan) and to the satisfaction of the business rescue practitioner. If this is not possible or improbable to perform during the meeting or by a matter of preference of the practitioner, the practitioner may adjourn the meeting to revise the business rescue plan for further consideration at a later date in terms of S153 of the Companies Act.

S153(1) requires that if a business rescue plan has been rejected or amended the business rescue practitioner must request a vote from all the holders of voting interest for the business rescue practitioner to prepare and publish a revised business rescue plan. Sarah should have therefore on realizing the potential need to amend the plan set up a meeting to vote on the proposal to propose and amend the plan, the new proposed plan would thereafter be subject to a new meeting to determine the future of the company S151, read together with the considerations of the proposed business rescue plan under S152 and the potential consequences of not adopting the amended business rescue plan.

S153(3) further requires that should Sarah wish to amend the business rescue plan and publish a revised business rescue plan, the aforementioned meetings and votes should be performed and the revised business rescue plan be prepared and published within 10 business days.

The revised business rescue plan will be subject to the S151 meeting, and the voting requirements set out in S152(2) are supported by the holders of more than 75% of the creditors voting interest that voted and at least 50% of the independent creditors. Where any securities are affected in the revised plan a majority vote of the classes of securities that were affected in this regard only after which the amended business rescue plan may be adopted and implemented.

The consequence of not meeting the S151 meeting requirements, resulting in the rejection of the business rescue plan Sarah would be required to apply to the court to challenge the vote, or alternatively Sarah must promptly file a notice of the termination of the business rescue proceeding if she believe that without the amendment (under the original proposed business rescue plan) the companies no longer have a reasonable prospect of being rescued.

Sarah would be required to inform the court, the company and all affected persons in the prescribed manner, and apply to court for an order to discontinue the business rescue proceedings and place the company into liquidation.

Question 19

Placing yourself in the shoes of Opera Sound Engineering, explain three key items you would expect to see in the financial projections of the business rescue plan to assist you to vote in the business rescue of Khusela. (3)

In understanding the operations of Khusela three of the key items that would assist in formulating an informed vote for the business rescue plan would be:

1) Revenue projections including the number of artists utilizing the services of Khusela, as well as the revenue per artist. To fully understand the concentration risk that Khusela may face, where the loss of a few artists may result in insufficient revenue generation. A clear understanding of the breakdown of the revenue should be provided, and each driver

Commented [M42]: 1 out of 3 marks. These items all relate to a detailed explanation as to the way in which the business may be restored to solvency and trade profitably. To consider other aspects such a BRP fees, PCF and a comparison between the BR dividend and a liquidation dividend.

increasing/decreasing the revenue such as facility rentals and travel revenue, as well as the growth assumptions that are used in the forecast (in addition to artist revenue) should be clearly noted.

2) A detailed understanding of the key direct input cost that Khusela incurs such as the rental of the studio space and recording equipment to fully understand the potential margins that Khusela is expected to obtain (fully understanding that a large portion may be related to work performed by Opera Sound Engineering). The drivers of these input costs should also be identified to determine what would constitute a fixed cost and a variable cost, to fully understand the effect of the potential loss of any customers on the bottom line and the ability of Khusela to repay Opera Sound Engineering. Importantly these should also include the lease costs related to the equipment and studio space, to allow Opera Sound Engineering to gauge whether the forecast of the company will generate sufficient revenue and allow the company to assess the risk versus reward related to the business rescue process.

3) An understanding of the material distribution agreements that Khusela has in place and any potential forecasted acquisitions of material distribution agreements. To allow Opera Sound Engineering the ability to assess the future revenue potential as well as the potential for future work required from Opera Sound Engineering. Including the major current agreements highlighting the present value of the agreements as well as the contracted timeframe, and potential cancellation of major agreements. This will allow Opera Engineering to understand the viability of the forecasted figures and determine whether there is sufficient runway in order to realise the proposed business rescue plan.

Question 20

Commented [M43]: 2 marks.

Ms Sarah van Zyl has asked you whether she should include a cash flow statement in her business rescue plan, as technically it is not required. What would your response be? **(2)**

Under the Companies Act 2008 there is no specific mention of a cash flow to be incorporated, however, it is best practice to include a cash flow for a period in line with that of the required income statement and balance sheet being a three-year projection.

A cash flow is critical for the creditors and the users of the business rescue plan to understand the liquidity position of the company. The Cash flow position of the company is paramount in understanding the financial health of the company and the potential failures that may occur due to potential cash flow constraints.

Majority, of the companies that eventually end up in business rescue results from the lack of a liquidity position and the company not being able to meet their short-term obligations in the ensuing six months due to the lack of cash flow.

A forecasted cash flow is therefore of significant importance for the voters of the business rescue plan to determine the viability of the plan. As the company's ability to continue to

operate largely depends on its ability to generate or access sufficient cash to support the continued operations of the company.

Therefore, the inclusion of the company's ability to meet this requirement will allow the users of the business rescue plan to assess the short-term risk of the business rescue plan, and establish a more informed view on the decision of whether the vote for or against the business rescue plan. This will allow the users to better understand the potential of receiving a better return from the proposed business rescue versus the liquidation, and will enhance the ability of the business rescue plan being adopted. The inclusion of the cash flow is therefore of paramount importance and considered best practice.

Question 21

Commented [M44]: 3 marks.

From the perspective of the employees, what are three advantages of Khusela being placed in business rescue rather than being liquidated? **(3)**

Under business rescue, the employees are offered statutory protection of their employment, as the terms and conditions of their employment will remain in force as they were pre-business rescue. Whereas the liquidation process will mean the demise of the company and the employees will no longer have any employment or future earnings (outside of the potential proceeds from the liquidation). With regard to an immediate liquidation, any remuneration outstanding before the liquidation will result in these costs being seen as unpaid creditors and will be concurrent in the ranking of the liquidation proceeds waterfall.

Under business rescue S 135(1) provides that to the extent that any remuneration, reimbursement for expenses, or other amounts of money relating to employment becomes due and payable by the company during the business rescue process, but is not paid, the money will be regarded as post-commencement finance and will be paid in accordance with S135(3)(a) where the claims will have preference and will rank second alongside the business rescue costs. An additional important consideration is that the preference established related to the "PCF" employment out-of-business rescue will be retained should the business rescue process be superseded by a liquidation order (Confirmed through the Diener Judgment).

Under S144(2) of the Companies Act any remuneration to the extent of unpaid remuneration, reimbursement for expenses, or other pre-business rescue, will result in the employee claims being seen as a preferred unsecured creditor to the company.

Under the business rescue process, the Chapter 6 of the Companies Act 2008 incorporates labour law protection, and requires that any retrenchment contemplated in the business rescue plan will be subject to S189 and 189A of the labour Relations Act 1995.

*** END OF ASSESSMENT ***

TOTAL MARKS: [100]