



**INSOL**  
INTERNATIONAL



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**PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023**

Commented [BB1]: TOTAL = 73/100

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)**

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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

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

All candidates are expected to comply with ALL the instructions.

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## 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.

Commented [M2]: Total for Q1: 17 marks.

#### 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?

Commented [M4]: 1 mark

- (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]: 1 mark

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]: 1 mark

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]: 0 marks

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]: 1 mark

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]: 0 marks

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]: 1 mark

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]: 0 marks

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)

[In terms of Section 133(1) of the Companies Act 2008 no legal proceeding including enforcement action maybe be commenced or proceeded with in any forum during business rescue proceedings with regards to the company, property belonging to the company or any property in the companies lawful possession ,except if the business rescue practitioner grants permission in writing or with the leave of the court and on terms the court considers suitable.

In terms of the section there is a moratorium placed on the company's debt during business rescue, therefore the legal claims of the creditors will not be enforceable while the company is in business rescue, regardless of whether the legal proceedings where commenced before the business rescue except as stated above.]

#### Question 3

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

[In terms of section 152 of the companies act creditors vote required to adopt a business rescue plan is at least 75% of the creditors who vote at the meeting supporting the plan and at least 50% of these votes must be by independent creditors.

In terms of section 152(3) of the Companies Act 2008 If no effect to the right of the holders of company securities, then the above votes in support of the plan will result in the business

**Commented [M23]:** 2 marks out of 2. Note that there is a moratorium on [legal proceedings](#) by virtue of section 133 of the Companies Act.

**Commented [M24]:** 3 marks out of 3.

rescue plan being adopted subject to the satisfaction of any conditions on which the plan is contingent.

If the rights of holders of securities are affected, then the business rescue practitioner must hold a meeting with the holders of the securities after the creditors have voted in approval as above, for a vote to approve the business rescue plan. If approved by the holders of the securities, then the business rescue plan will be considered as adopted, if the holders of security do not achieve a majority vote then the business rescue plan would be considered as rejected.]

#### 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)

[The approved business rescue plan is binding on Opera Sound Engineering.

In terms of Section 152(4) an adopted business rescue plan is binding on the company, the creditors, the holders of securities regardless of whether they were present at the meeting or not, voted against or in favor the business rescue plan, or in terms of creditors whether they proved their claims or not.

In terms of section 154(2) if a business rescue has been approved and implemented in terms of Companies Act 2008 a creditor is not entitled to enforce claims against a company for a debt incurred by the company prior to the start of business rescue except as provided for in the business rescue plan.

Opera would not be able to make claims from the company for debt by company before business rescue in terms of section 154(2) except to extent allowed in the business rescue plan despite not voting in approval.

However, If any of their debt has been compromised in the plan they could have a claim against anyone who signed a surety for the debt on behalf of the company depending on the details of the deed of surety.]

#### 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 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)

[Business rescue for Khusela was a compulsory rescue, Consideration will be given to the requirement of Section 131 of the companies act and definition of financial distress.

Section 128 defines financial distress. It considers financial distress as a situation where it is reasonably unlikely that a business will be solvent in the ensuing six months or that

Commented [M25]: 3 out of 3 marks.

Commented [M26]: 3 marks out of 5. Needed to discuss the principles in *Gormley v West City Precinct Properties (Pty) Ltd* and *FirstRand Bank v Lodhi 5 Properties Investment*.

reasonably unlikely the business will be able to pay debts as they become due in the following six months.

In terms of section 131 an affected person may apply to court to place the company under supervision. The court may place the company under supervision if it satisfied that the company is :

- i. Financially distressed,
  - ii. the company has failed to pay over amounts in terms of obligations in terms of a public regulation or contract with respect to employment related matters, or
  - iii. it is just and equitable to do so for financial reasons.
- and there must be a reasonable prospect of rescuing the company.

Initially it was held that as financial distress is forward looking a company that is already insolvent ought to be liquidated. However, this was considered in:

- *Oakdene Square Properties Pty Ltd v Farm Bothasfontein Pty Ltd* it was held that a commercially insolvent company still met the requirement of financial distress but also met the requirements for an insolvent winding up as it was unable to pay its debts. Depending on the circumstances there are times where liquidation would be better.
- *Tyre Corporation Cape Town Pty Ltd v GT Logistics Pty Ltd* it was held that the companies act does not contain any provisions on what is meant by just and equitable. The court held that it would be wrong in its view that an already insolvent company can still be regarded as financially distressed, the alternative that it is just and equitable "could be relied on instead.

With regards to Khusela if it can be considered that the company is in financially distressed, and court can place it into business rescue based on it being just and equitable for financial reasons as it owes a substantial amount of money.

Where the company is possibly already insolvent the court can consider if it is just and equitable for financial reasons to place Khusela in business rescue if there is a reasonable prospect of rescue based on the Tyre Corporation case law.

It can be said it is not too late to be placed into business rescue if there's a reasonable prospect of rescue.]

#### 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)**

[In terms of section 131(6) of the Companies Act 2008 if liquidation proceedings have already been commenced by or against the company at time of application in terms of 131(1) (being the application for compulsory business rescue by an affected person) the application in terms 131(1) - will suspend those liquidation proceedings until

- (a) the court has adjudicated on the business rescue application or
- (b) the business rescue proceedings come to an end if court makes an order applied for.

**Commented [M27]:** 2 marks out of 5. Needed to discuss relevant case law ie. *Lutchman NO v African Global Holdings, ABSA Bank Limited v Summer Lodge, Standard Bank of South Africa Limited v Gas2Liquids (Pty) Ltd* and *Standard Bank of South Africa v A-Team Trading CC.*

- There is no clear meaning of liquidation proceedings in the Companies Act as to whether it means court proceedings until final liquidation order has been issued or the process where company is being wound up under the liquidator after winding up order has been issued.
- In *Ritcher v Absa bank Limited* it was stated that application in terms section 131 to place business under rescue can be made at any time even after the final liquidation order has been granted.
- In *Van der Merwe and Others v Zonnekus Mansion and Another (CSARS and Another)* the court agreed to the decision in *Ritcher v ABSA* that it was in consonant with the legislature in section 132(1) (c) which states that business rescue begins when the court makes an order placing a company under supervision during the course of liquidation proceedings.
- Based on the above the application to have Khusela placed under rescue would suspend the liquidation application by World of Music until the court has adjudged on the matter or until the business rescue process comes to an end. ]

### 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)**

[Section 134 imposes a restriction on the business rescue practitioner in disposing of property in which creditors have a security right.]  
 General notarial bond only confers a preference to its holder upon liquidation and only after statutory creditors but before concurrent creditors.  
 This preference is only triggered in terms of insolvency law.  
 As Crypto banks general notarial bond only confers preference in the event of liquidation the assets subject to the general notarial bond remain unsecured, therefore Ms. Sarah Van Zyl will be able to utilize the assets without Crypto Banks consent.

**Commented [M28]:** 0 marks out of 2. See page 75 of the Course Notes.

Also, once business rescue commences Crypto bank would not be able to perfect its security with regards to the general notarial bond Without the permission of the business rescue practitioner or consent of the court.]

**Question 7.2**

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

[ In terms of section 134 of the Companies Act. The company may dispose of property while in business rescue only if:

- in the ordinary course of its business-the redundant equipment and unroad worthy vehicles could not be considered to be sold in the ordinary course of business as Khusela is in the business of producing music.
- in a bonafide transaction at arms length for fair value approved in advance and in writing by the practitioner-if the funds are considered urgent to fund ongoing operations then this would be an ideal option.This option would probably be best as funds are required to fund ongoing operations
- in a transaction contemplated within and undertaken as part of the implementation of a business rescue plan that has been approved in terms of section 152-this would be utilised if funds are not urgently required however in this case funds are required for ongoing operations

]

**Question 8**

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 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)**

[In terms of section 135(2) of the companies Act 2008 during business rescue process a company may obtain financing and any such financing in terms of section 135(2)(a) maybe secured to the lender by utilizing any asset of the company to the extent that it is not otherwise encumbered.

Sarah Van Zyl can only agree to Easy Access's requirements if:

- In terms of a business rescue plan she can include a proposal to compromise the debt of Crypto Bank . If after voting on the plan and it is adopted then in terms of section 152 it will

**Commented [M29]:** 4 marks. Well done.

**Commented [M30]:** 0 marks. Needed to discuss section 134(3).

be binding on Crypto Bank as well. In terms of 154(1) if Crypto votes in favor then they lose right to enforce debt compromised ,or in terms 154(2 ) if Crypto does not vote in approval to the business rescue plan Crypto Bank would not be able to enforce their debt. On approval of plan security held by Crypto bank would be released pursuant to the plan.

- If this plan is approved then Sarah can agree to Easy Access's requirements.
- It is unlikely Crypto bank would support this plan however if business rescue plan is adopted in terms of section 152 then the plan could be crammed down on Crypto Bank and then they would have no right to enforce their debt incurred before business rescue. Thereby security for the debt can be released. Other affected persons could vote for the plan to compromise Crypto bank debt if it shows that the post commencement finance would assist in available dividends.
- Ms Sarah can also advise Easy Access that they will be at less risk even without security as a post commencement funder, they would be paid before pre business rescue debts and after business rescue fees and cost and employees post commencement finance in terms of section 135(2)(b).
- Ms Sarah could consult with Crypto bank and offer alternate security to their satisfaction]

#### Question 9

The business rescue practitioner of Khusela Entertainment (Pty) Ltd was faced with a work force 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 [M31]:** 2 marks out of 7. Need to state that in the absence of a collective agreement that allows for a reduction in salaries and benefits, the BRP must commence a section 189 process. Need to specifically state what the section 189 process can be used for - i.e altering of rights and status, or retrenchment of employees. Need to state that the BRP could contemplate issuing voluntary severance packages, subject to any collective agreements. Needed to apply the legal principles to the facts and conclude that the section 189 process carried out by Sarah was both unlawful and unenforceable.



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)

[The business rescue did not follow the correct process in terms of case law.

Section 136(1) of the Companies Act South Africa states that despite any provision to the contrary during business rescue proceedings employees of the company remain so employed as immediately before business rescue process began, they retain the same terms and conditions except when (a) changes happen in the ordinary course of attrition or (b) the employees and the company in accordance with applicable labour laws agree on different terms and conditions and

136(1)(b) any retrenchment of any such employees contemplated in the business rescue plan is subject to section 189 and 189A of the Labour Relations Act and other applicable employment related legislation.

In a case *South African Airways SOC Ltd and others v National Union of Metals Workers of South Africa* The Labour Court considered retrenchments in terms of section 136(1)(b).

- The Labour Court stated that it was procedurally unfair to retrench employees before the business rescue plan contemplating such matters on retrenchment was published and adopted.
- The Labour Court considered the matter from a vantage point of the Constitutional right to fair labour practices which is embodied in the Labour Relations Act. The court reasoned that if there was an interpretation of section 136(1)(b) that promotes the preservation of job security then that interpretation ought to be preferred.
- The purpose of business rescue process was to rehabilitate financially distressed companies in a manner that balances the rights and interests of all affected persons being creditors, shareholders, employees and registered trade union, where it was not possible to return the company to being a solvent company the second aim is to achieve a better return for affected persons including employees than immediate liquidation. It was therefore considered that employees' rights would be fairly balanced if any retrenchments are considered in a plan just as matters pertaining to other affected parties were also considered in the business rescue plan. (this was adopted from [https://www.hoganlovells.com/-/media/hogan-lovells/pdf/2020-pdfs/2020\\_05\\_11\\_alert\\_numsa\\_vs\\_saa.pdf](https://www.hoganlovells.com/-/media/hogan-lovells/pdf/2020-pdfs/2020_05_11_alert_numsa_vs_saa.pdf))

- There is no provision the chapter 6 of the companies act that empowers the business rescue practitioner to retrench employees in the absence of an approved business rescue plan

In a case National Union Metal works of South Africa and others v Aveng Trident steel and another the company not in business rescue retrenched for operational reasons. In this case an employer would be allowed to follow section 189/189A process of the Labour Relations Act. However, for business rescue the Practitioner must first include proposal to retrench in the business rescue published, when the business rescue plan has been adopted then business rescue practitioner may commence section 189 and 189A of the Labour Act processes.

The employees would also have a right to vote as affected persons on the business rescue plan. The rights of employees is of importance in Business rescue and their rights have been entrenched in chapter 6 of the Companies Act.

#### Question 10

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

[The employees of Khusela have rights as stated in section 144 of the companies act 2008. The rights as set out in section 144(3) are as follows:

- the right to receive notice of each court proceeding, meeting, decision or other relevant matters in terms of business rescue, the employees are entitled to be served these notices at their place of work and at the head office
- the employees also have a right to participate in any court proceedings during business rescue
- the employees also have a right to be consulted during the development of the business rescue plan and to be given sufficient time to review the business rescue plan prior to section 152 meeting where the business rescue plan is to be discussed and voted on,
- the employees also have a right to form a committee of employees representatives
- right to make any submissions in terms of the business rescue plan before voting on the plan
- employees also have a right to propose the development of an amended business rescue plan by the business rescue practitioner if on voting it is rejected in terms of section 152
- the employees also have a right to vote on a motion with creditors on the business rescue plan in terms of which they are a creditor of the company]

#### 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)**

**Commented [M32]:** 3 marks.

**Commented [M33]:** 2 marks. Needed to discuss the fact that directors are relieved of certain of their fiduciary duties to the extent that they act according to the BRP's instructions and subject to his/her instructions.

[Yes as they are directors of the company they would have a role during business rescue as highlighted in section 137 of the companies act 2008. In terms of section 137 the directors:

- continue to exercise the functions of directors subject to the business rescue practitioners authority
- have a duty to exercise management function in accordance to business rescue practitioners instructions to the extent that it is reasonable.
- must attend to the business rescue practitioners requests at all times and must provide the practitioner with any information about the company affairs as maybe reasonably required.

Directors role is also considered in section 142 of the Companies act 2008. The directors have a duty to deliver all books and records with details of company affairs to the business rescue practitioner, inform the business rescue practitioner if there other records elsewhere and in five business days after business rescue process begins or such time as the business rescue practitioner may allow give business rescue practitioner a statement of affairs containing all relevant information of the company as required in section 142(3)]

#### Question 12

Commented [M34]: 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)

[Consultation of affected persons in terms business rescue was considered in Hlumisa Investments Holdings (RF Limited and Another) V Van der Merwe No and others, it was stated there is a difference between informing and consulting.

In determining what should be considered consulting the court with approval quoted Judgement by Rogers J from various cases he considered in the matter Scalabrini Centre Cape Town and others v Minister of Home Affairs, in which it was stated that:

- at a substantive level consulting entails a genuine invitation to give advice and genuine receipt of that advice;
- Consultation is not to be treated perfunctionality or as a mere formality. This means that engagement after the decision maker has already reached his decision or once their mind has become unduly fixed is not compatible with a true consultation and
- While at a procedural level consultation maybe conducted in any appropriate manner determined by the one making a decision the process must be one that enables consultation in the substantive sense to occur.

Based on the above analysis the court in Hlumisa determined that the informing of creditors, shareholders of what was happening by way of SENS (Stock Exchange News Service) announcements and in meetings with individual shareholders or a body of preferent creditors did not amount to consultation.

Ms Zyl should engage properly with all affected persons to hear their views and to take them into account whilst preparing a business rescue plan. Lack of proper consultation before

publishing and putting a plan to vote could result in an affected party applying to court to interdict the voting process until proper consultation has taken place]

#### Question 13

Commented [M35]: 2 marks.

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)

[In terms of Section 143 of the Companies Act 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.

In terms section 143 Ms Sarah should have a meeting where she can propose a remuneration agreement with Khusela for additional remuneration.

The remuneration will be approved if majority of the creditors vote in favor of the remuneration agreement and also approval in terms of a majority vote of the shareholders of the company that have rights to shares that would be entitle them to a portion of the residual value on winding up]

#### Question 14

Commented [M36]: 3 marks.

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)

[Section 143 states that the business rescue practitioner is entitled to charge an amount of remuneration based on the tariffs, the tariffs are found in the regulation.

Regulation 128 outlines the remuneration that maybe charged per hour with a maximum amount per day based on the size of the company.

The size of the company is determined in terms of regulation 127(2)(b) read with regulation 26. in terms of those regulations companies are categorized based on the public interest score which takes into account the number of employees (1 point per employee), also 1 point for 1 million in third part liability, it also considers turnover. If the score is 500 or more it is considered as a large company, if the score is 100-500 it is considered medium, less than 100 points it is considered small.

Khusela has approximately 2000 employees thereby already at 2000 points.

Khusela is therefore considered a large company in regulation 127(2).

Regulation 128(1)c states tariff for business rescue practitioner of a large company will be R2000 per hour to a maximum of R25000 per day including vat in the case of a large company.

Ms Sarah can charge 2000 per hour to a maximum of R25 000 per day. ]

**Question 15**

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)**

[In terms of section 141(1) of the Companies Act, As soon as practicable after a practitioner is appointed they must investigate the company affairs, business ,property and financial situation and after having done so consider whether there is a reasonable prospect of the company being rescued.

At a first meeting of creditors as determined in section 147(1) the practitioner convenes said meeting and presides at this meeting.

At this meeting business rescue practitioner must inform the creditors whether the practitioner believes there is a reasonable prospect of rescuing the company and may also receive proof of claims at this meeting.

In terms of section 141 as soon as Ms Sarah accepted the appointment as business rescue practitioner she was supposed to begin investigating the company affairs to determine if there is a reasonable prospect of rescue.

Despite not being rectified yet she must comply with the section. By the time section 147 creditors meeting was held Ms. Sarah was supposed to give the creditors her opinion as to whether there is a reasonable prospect of rescue.]

**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 terms of section 150(5) of the Companies Act 2008 the business rescue plan must be published within 25 days after which the business rescue practitioner was appointed, or

**Commented [M37]:** 3 marks.

**Commented [M38]:** 2 marks. Needed to refer to section 132(3) - publish monthly progress reports after month 3 as the BR proceedings did not end within 3 months.

such longer time that maybe allowed by court on application by business rescue practitioner or allowed by the holders of majority of creditors voting interest.

The simplest way would be to obtain a vote from the majority of creditors to extend the days failing which application can be made to court.

Failing to abide by the sections could lead to an affected person applying to court to have Ms Sarah removed on the grounds that the practitioner in terms of section 139(2) is not competent or failed to perform duties. Another reason that can be used when applying to court to have Ms Sarah removed would be Section 139(2)b of the companies Act 2008 failure to exercise the proper degree of care in the performance of the practitioners duties]

#### 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)

[One needs to look to the act to determine if Mr Siwisa is an independent creditor. Section 128(1)g of the Companies Act 2008 contains the definition of an independent creditor which is defined as a person who is a creditor of the company, including an employee by virtue of being owed salaries prior to the beginning of business rescue terms of section 144(2) and is not related to the company, a director or practitioner.

Next, we would need to determine if Mr Siwisa is considered a related party. Section 2 of the companies act contains the definition of what related means.

It states that for the purpose of the Companies Act 2008:

2(1)a) An individual is related to another individual if they:

- i) are married or live together as married.
- ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity.

b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person.

We would then need to consider if Mr Siwisa controls the entity.

In terms of Section 2(2) (a) person controls a juristic person or its business if:

- in the case of a juristic person that is a company (ii) that person together with any related or inter related person is (aa) directly or indirectly able to exercise or control a majority of the voting rights associated with securities of that company.

Mr Siwisa is a creditor as he is owed funds by the company.

**Commented [M39]:** 5 marks. Excellent answer.

To consider if he is independent it needs to be determined if Mr Siwisa is not related to the company, a director, or the practitioner.

In terms of section 2 Mr Siwisa is related to Mrs. Lungi Philip in the second degree of affinity as brothers/sisters even half brothers or sisters are second degree relatives.

Another consideration would be to consider if Mr Siwisa is related to Khusela. In terms 2(2) Mr Siwisa would be considered to control Khusela as Mr Siwisa and Mrs Phillips are related, and they together directly can exercise, or control majority of the voting rights associated with the shares of this company.

Mr Siwisa owns 25% and Mrs Philip owns 26% together they have 51% voting rights as there is only one class of shares and each share entitles a shareholder one vote. Together they control majority of the voting right.

Based on this Mr Siwisa is not an independent creditor of Khusela as he is related to the company Khusela.]

#### 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)

[In terms of Section 140(1)d during business rescue proceeding the practitioner is responsible to develop a business rescue plan to be considered by affected persons and implement any business rescue plan that has been adopted in terms section 152 failing which section 153.

In terms of sections 152(1)e at a meeting to vote on the business rescue plan practitioner must call for a vote for preliminary approval of the proposed plan as amended if applicable unless meeting is adjourned.

There is no section in the companies act that provides for the business rescue practitioner to amend a business rescue plan once finally adopted.

A look at case law in Vantage Goldfields SA (Pty) Ltd and others v Arqomanzi (Pty) Ltd, in the case the business rescue practitioners unilaterally amended the business rescue plan in their defense they stated they had inserted a clause that allowed them to amend the plan. Arqomanzi argued that clause was considered for altering administrative matters and not amending substance of the plan.

The court considered section 140(1) d and stated that the implementation of a plan must be considered by affected persons in terms of section 152.

The court concluded that the business rescue Practitioner could not unilaterally amend previously adopted business rescue plans and that any offers be subject to compliance with relevant legislation for proper adoption by creditors of the entity under rescue.

The practitioner should act within the confines of section 140(1) d therefore to amend the plan the practitioner should consult affected parties, publish amended plan to be voted on

**Commented [M40]:** 4 marks. Needed to state that if the amendments affect the rights of shareholders, then shareholders are required to vote on such amendments. Needed to refer to the *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue)* and Another judgment.

as per section 152 process. Creditors and other affected persons to vote on the amendments in terms of a meeting to vote on the amendments. It will only be adopted based on the voting interests required to adopt a business rescue plan.

Based on above Sarah van Zyl unilateral amendment was incorrect, as it was also stated in this case where amendments are prejudicial, they cannot be allowed as crypto bank and old money were prejudiced]

#### Question 19

Commented [M41]: 3 marks.

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)

[Three key items I would expect to see in financial projections.

- Dividends payable-Opera would be interested potential dividend to paid and timing thereof
- Revenue projections -to see if theres a prospect of rescue and if these are reasonable based on past and market trends
- Business rescue practitioner remuneration-to see if this is fair in relation to the companies current situation
- Post commencement funding to be made available-this will help opera Sound Engineering in deciding if they can trade with Khusela going forward ]

#### Question 20

Commented [M42]: 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)

- [it is correct a cashflow statement is not a requirement, only an income statement and balance sheet in terms of the companies act.
- In a case were business rescue plan determines to pay dividends the cashflow statement will help to show if sufficient cash is being generated to make planned payments and if there are any risks to the cashflows
- A cashflow provides comfort to creditors of commercial solvency
- Cashflow will show key soruces of finance and helps suppliers in deciding on dealing with business post business rescue]

#### Question 21

Commented [M43]: 3 marks.

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



[Advantages to business rescue versus liquidation are:

- Employees in business rescue retain their jobs as stated in section 136(1) their jobs are preserved and the practitioner cannot suspend their employment contracts. whilst in liquidation the employee contracts are initially suspended then terminated therefore loss of jobs
- Employees get their salaries post business rescue, if unpaid during business rescue commences they are considered post commencement finance and are preferred post commencement funders and they rank after business rescue fees and expenses, if business rescue converts to liquidation section 135(4) states preference is retained in terms of the post commencement finance except in relation to liquidation costs
- Employees in business rescue are considered as preferred unsecured creditors for any unpaid salaries pre business rescue in terms of section 144. while in business rescue pre liquidation salaries are considered under concurrent creditors and amounts payable are limited therefore employee might get less than what they would normally earn.
- Any retrenchments in business rescue are considered pursuant to section 189 labour laws which is not the case in liquidation as the jobs are lost]

**\*\*\* END OF ASSESSMENT \*\*\***

**TOTAL MARKS: [100]**