



INSOL
INTERNATIONAL



PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023

Commented [BB1]: TOTAL = 68/100 (mark adjusted upwards)

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.

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

Commented [M2]: Total for Q1: 16 marks.

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

Question 1.1

Commented [M3]: 0 marks

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?

- (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

Commented [M4]: 1 mark

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?

- (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]: 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]: 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]: 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]: 0 marks

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]: 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)

These creditors will be bound by the provisions of Section 133(1)(a) and (b) which read as follows:

"133(1) during business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except -

- (a) With the written consent of the practitioner;
- (b) With the leave of the court and in accordance with any terms the court considers suitable;"

Clearly, the legal action taken by the creditors mentioned concerns enforcement action against the company, and as such, the company is protected by the general moratorium afforded in terms of Section 133 as such action was either commenced or proceeded with.

Question 3

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

Commented [M23]: 1 mark out of 2. The question specifically required you to discuss the enforceability of legal proceedings. In your answer you merely stated that the company would be protected by the general moratorium but did not mention that the legal proceedings would be unenforceable, unless the consent of the business rescue practitioner was obtained or leave of the court was granted.

Commented [M24]: 3 out of 3 marks.

The requisite majority of creditors' support that is required for a business rescue plan to be adopted is governed by the provisions of Section 152(2)(a) and (b) which provides as follows:

"2(a) In a vote called in terms of subsection 1(e), the proposed business rescue plan will be approved on a preliminary basis if -

- (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 interests, if any, that were voted.

The business rescue plan will then be deemed to have been finally adopted if it does not have the effect of altering the rights of the shareholders, which according to the facts set out above, it does not.

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)

Commented [M25]: 3 out of 3.

Yes, the business rescue plan is binding on Opera Sound Engineering.

The provisions of Section 152(4) are instructive, which reads as follows:

"152(4) a business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company securities, whether or not such a person -

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

Opera Sound Engineering is considered to be a dissenting creditor, which is subject to the 'cram down', principle.

In the matter of DH Brothers Industries (Pty) Ltd vs Gribnitz N.O and Others 2014(1) SA 103 (KZP), the Court confirmed the principle of "cram-down" relating to the voting interests of the non-assenting creditors and absent parties upon which the business rescue plan is approved, must not be more than 25%.

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)

Commented [M26]: 1 mark out of 5. Needed to discuss the requirement of financial distress in light of applicable case law.

To determine whether Khusela met the requirements of the definition of 'financially distressed', and ought to have been placed into business rescue, it is important to consider the definition of financial distress as follows:

"128(1)(f) **'Financially distressed'**, in reference to a particular company at any particular time, means -

- (i) It appears to be reasonably unlikely that the company will be able to pay all of its debts as they come due and payable within the immediately ensuing 6 months; or
- (ii) It appears to be reasonably likely that the company will become insolvent within the immediately ensuing 6 months"

Even though, on the facts given, Khusela was unable to pay its debts at the time of the application for business rescue, the above definition requires that it be unable to pay all of its debts as they became due and payable within the immediately ensuing 6 months. There are no facts to support this, and therefore it was not too late for a business rescue order to be issued. In fact, Khusela clearly met both requirements as set out in the definition of 'financially distressed' and, once that definition was met, it was prudent to place Khusela into business rescue. Furthermore, and in terms of Section 131(4), there was a reasonable prospect for rescuing the company given that it had been business for almost 30 years, and has an established brand and goodwill in the South African Music Industry.

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)

Commented [M27]: 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.

On the given set of facts, an affected person may apply to court and obtain a court order placing the company in business rescue, in terms of Section 131(1) of the Companies Act.

In terms of Section 131(6), liquidation proceedings, if already commenced at the time of the application for business rescue in terms of Section 131(1), such application will suspend the liquidation proceedings until -

- (a) The Court has adjudicated upon the application; or
- (b) The business rescue proceedings end, if the Court makes the order applied for.

However, in the above scenario, the liquidation application had not been served and filed on the company. Therefore, the simple preparation of a liquidation application has no effect on the application for business rescue. If the application for liquidation had already been filed at the High Court at the time of the application for business rescue, it would be suspended.

In *Richter vs ABSA Bank Limited* 2015(5) SA 57(SCA), the Supreme Court of Appeal held that an application in terms of Section 131 of the Companies Act to place a company under business rescue can be made "at any time", going so far as to say that even after the final liquidation order has been issued.

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 [M28]: 2 out of 2 marks.

A general notarial bond over movable assets is not considered to be a title interest nor a security interest to a creditor holding such security. For such a creditor to become secured, the creditor must have either taken possession of the movable assets subject to the general notarial bond either voluntarily (i.e with the consent of the company) or by perfecting its security under such bond by obtaining an order from Court authorizing that such creditor take possession of the movable assets, prior to the company being placed under business rescue. Such an application would be considered as enforcement action in terms of section 133(1) of the Companies Act, and the creditor will be prohibited from bringing such an application or perfecting such security after the adoption of a business rescue resolution or an order placing the company in business rescue.

Question 7.2

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

It is clear that the business rescue practitioner is in possession of the assets, being the redundant equipment and old vehicles. Crypto Bank has no security over the movable assets of the company. On the facts given, Fast Cars (Pty) Ltd, in respect of whom the company has concluded instalment sale agreements, does not have a contractual reservation of ownership, and therefore does not have a "title interest".

Given that the movable assets which Sarah wishes to sell is not subject to any security, be it a title interest or a security interest, she is free to dispose of the assets without obtaining the consent of any of the creditors.

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.

Commented [M29]: 0 marks out of 4. This question required a discussion of the requirements set out in section 134(1)(a) of the Companies Act

Commented [M30]: 4.5 marks. Needed to state that "security could be provided for the amount of the proceeds to the reasonable satisfaction of Crypto Bank".

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)

The following provisions of the Companies Act apply.

“Section 134(3) if, during a company’s business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must –

- (a) Obtain the prior consent of that person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person’s security or title interests; and
- (b) Promptly –
 - (i) Pay to that other person the sale proceeds attributable to that property up to the amount of the company’s indebtedness to that other person; or
 - (ii) Provides security for the amount of those proceeds, to the reasonable satisfaction of that other person.

Furthermore, Section 135 provides as follows:

“Section 135(2) during its business rescue proceedings, the company may obtain financing other than as contemplated in subsection (1), and any such financing –

- (a) Maybe secured to the lender by utilizing any asset of the company to the extent that it is not otherwise encumbered; and
- (b) Will be paid in order of preference set out in subsection (3)(b).

As such, Sarah may only agree to Easy Access's requirements if Crypto Bank consent to the release of their cession of their rights under the notarial distribution agreements, or to cede such rights to Easy Access, unless the proceeds by Easy Access would be sufficient to fully discharge the indebtedness protected by Crypto's security in respect of the material distribution agreements.

Sarah must obtain the consent of Crypto Bank.

Sarah may not unilaterally agree to Easy Access's requirements.

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.

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)

Commented [M31]: 3 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 discuss the fact that the BRP may commence with a section 189 process in the absence of a collective agreement that allows for a reduction in salaries and benefits. 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.

The given set of facts indicate that the consultative process and retrenchment process were finalized before the business rescue plan was drafted, and which plan was published after the retrenchment process in terms of Section 189 was finalized.

The retrenchment process was procedurally unfair in terms of the Labour Relations Act, and in breach of the relevant provisions of the Companies Act.

Any contemplated retrenchment process must be included as a proposal in the draft business rescue plan for consideration, voting and adoption at a meeting of creditors, at which meeting the employees are statutorily entitled to attend and vote.

In terms of Section 136(1)(a), the employees concerned continued to be so employed on the same terms and conditions during the business rescue proceedings as they were before the beginning of those proceedings, except to the extent that:

- 1.1 changes occur in the ordinary course of attritions; or
- 1.2 the employees in the company, in accordance with applicable labour laws, agree different terms and conditions; and (b) any retrenchment of any such employees contemplated in the company's business rescue plan is subject to Section 189 and 189A of the Labour Relations Act, and other applicable employment related legislation.

In the circumstances, the retrenchment process was not entitled to be proceeded with or finalized by Sarah before the adoption of the business rescue plan.

In the case of SA Airways (SOC) Limited (in business rescue) and Others vs National Union of Metalworkers of SA ("NUMSA") on behalf of members and others (2020), the Labour Court ordered that the retrenchment process by the business rescue practitioners prior to the approval and adoption by such retrenchment process in a business rescue plan is procedurally unfair. In the circumstances, Sarah did not follow the correct process and procedure in this case.

Any attempt to retrench employees other than by way of the adopted business rescue plan is a breach of s136(1)b)

Question 10

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

Commented [M32]: 3 marks.

The general rights held by the employees of Khusela during the business rescue process include, *inter alia* the following:

1. In terms of Section 136(2A)(b), the business rescue practitioner may not suspend or cancel any employment during business rescue.
2. In terms of Section 144, any monies relating to their employment which were due and payable by the company before business rescue, the employee becomes a preferred unsecured creditor, which is not capable of being compromised in a business rescue plan.
3. The business rescue practitioner is obliged to consult with the employees during the development of a business rescue plan;
4. In terms of Section 153 of the Companies Act, the employees are entitled to vote on the adoption of a business rescue plan.
5. In terms of Section 148 of the Companies Act, the employees are entitled to form an employees' representative committee and are entitled to ongoing and meaningful engagement with the business rescue practitioner.

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 [M33]: 1 mark. Needed to state that during BR proceedings, directors must continue to exercise their function as directors, subject to the authority of the business rescue practitioner and owe a duty to the company to exercise any management function in accordance with the instructions of the business rescue practitioner.

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.

1. Clearly Mr Themba Sithole (the Chief Executive Officer) and Mr Kabelo Mogale (the Chief Financial Officer), were part of the pre-existing management of the company at the time of business rescue. The board of directors, as well as management, do have a role during the business rescue process of Khusela. The provisions of Section 140 of the Companies Act are instructive. They provide as follows-

2. "Section 140(1) during a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter -

(a) Has full management control of the company in substitution for its board and pre-existing management;

(b) May delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;

..... "

3. Insofar as the board of directors are concerned, they too have a role to play during the business rescue process. In this regard, Section 142 of the Companies Act is instructive and provides as follows:

"Section 142(1) as soon as practicable after business rescue proceedings begin, each director of the company must deliver to the practitioner all books and records that relate to the affairs of the company are in the director's possession.

(2) Any director of a company who knows where other books and records relating to the company are being kept, must inform the practitioner as to the whereabouts of those books and records.

(3) within five business days after business rescue proceedings begin, or such longer period as the practitioner allows, the directors of a company must provide the practitioner with a statement of affairs containing, at a minimum, particulars of the following:

- (a) any notarial transactions involving the company or the assets of the company, and occurring within twelve months immediately before the business rescue proceedings began;
- (b) any Court, arbitration or administrative proceedings, including pending enforcement proceedings, involving the company;
- (c) the assets and liabilities of the company, and its income and disbursements within the immediately preceding twelve months;
- (d) the number of employees, and any collective agreements or other agreements relating to the rights of employees;
- (e) any debtors and their obligations to the company; and
- (f) any creditors and their rights or claims against the company.”

As such, both the pre-existing management, as well as the directors play a meaningful role during the business rescue process and it is important for both to co-operate with the business rescue practitioner and provide as much information and co-operation during such process.

Question 12

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)

Commented [M34]: 5 marks.

Judge Rogers enunciated on the term “consultation” in the matter of Scalabrini Center Cape Town and Others vs Minister of Home Affairs and Others 2013(3) SA 531(WCC) ad 72, as follows:

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

Consultation is not to be treated perfunctorily or as a mere formality. This 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;

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

Subsequent thereto the Court in Hlumisa Investments Holdings (RF) Limited and Other (A) v Van der Merwe N.O and Others [2016] JOL34326 (GP) stated that there is clear distinction between “informing” and “consulting”, and quoted with approval the above passage quoted in the Scalabrini judgment. In this context, and in accordance with Section 150(1) of the Companies Act, Sarah has a duty and obligation to consult meaningfully, as provided for above, with the creditors, other effected persons, and the management of the company before preparing a business rescue plan for consideration and possible adoption.

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)

Commented [M35]: 2 marks.

Yes, Sarah could propose an agreement with Khusela providing for further remuneration in addition to what is permitted by the Government - Regulated tariff.

In terms of Section 143, the following is relevant:

"143(1)

(2) the practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in subsection (1), to be calculated on the basis of the contingency related to -

- (a) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or
- (b) the attainment of any particular result or combination of results relating to the business rescue proceedings."

In terms of Section 143(3) any agreement for further remuneration if final and binding on the company if it is approved by:

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

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)

Commented [M36]: 3 marks.

Khusela had 2000 employees by the end of 2021.

Notwithstanding the third party liability of the company, its turnover or any other factors to determine the size of the company, the number of employees in and of themselves, gives the company a score of 2000 points, given that one point is ascribed per employee.

A company is considered a large company if its score is above 500.

As such, Khusela is a large company.

Given that Khusela is a large company, Sarah is entitled to charge an amount of R2000,00 per hour (maximum of R25 000,00 per day) (inclusive of VAT) for a large company, according to the tariff as set out in the Companies Regulations 2011, and in particular Regulation 128 thereof.

Question 15

Commented [M37]: 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)**

In terms of Section 131(5) of the Companies Act:

“(5) If the Court makes an order in terms of subsection (4)(a), the Court may make a further order appointing as interim practitioner a person who satisfies the requirements of Section 138, and who has been nominated by the effected person who applied in terms of Subsection (1) subject to the ratification by the holders of a majority of the independent creditors’ voting interests at the first meeting of creditors, as contemplated in Section 147.”

Furthermore, Section 147(1) provides as follows:

(1) within 10 business days **after** being appointed, the practitioner must convene, and preside over, a first meeting of creditors, at which -

a. the practitioner:

(i) must inform the creditors whether the practitioner believes that there is a reasonable prospect of rescuing the company;

(ii) may receive proof claims by creditors; and

.....

(2) the practitioner must **give notice** of the first meeting of creditors to every creditor of the company whose name and address is known to, or can reasonably be obtained by, the practitioner setting out the -

a. date, time and place of the meeting; and

b. agenda for the meeting.

..... (emphasis added)

Accordingly, Sarah was obliged to inform the creditors at the first meeting of creditors whether she believes that there is a reasonable prospect of rescuing the company. "must" is obligatory and not discretionary. This must take place at the first meeting of creditors. On the given facts, it is clear that Sarah did not inform the creditors whether she believes that there is a reasonable prospect of rescuing the company at the first meeting of creditors, as it was only thereafter that she began to investigate the affairs of Khusela and formed the view that it was capable of being rescued. In the circumstances, what ought to have taken place was the confirmation and ratification of her final appointment at the first meeting of creditors, which could then have been adjourned for the purposes of her fulfilling Section 147(1)(a), at which adjournment of the first meeting she could inform the creditors whether she believes there is a reasonable prospect of rescuing the company. In the alternative and during her interim appointment, she could have investigated the affairs of Khusela with the purpose of determining whether there is a reasonable prospect of rescuing the company, and at the first meeting of creditors, and subsequent to the ratification of her final appointment, inform the creditors that there is a reasonable prospect of rescuing the company. In terms of Section 141(1), Sarah was entitled to, as soon as practicable after being appointed, investigate the company's affairs, business, property, and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued.

There is nothing in the Companies Act which precluded Sarah from fulfilling her obligations in terms of Section 141(1) following her appointment as interim practitioner.

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)

Commented [M38]: 4 marks.

First, Section 132(3) is instructive in the event that business rescue proceedings have not ended within three months. It reads as follows:

- (3) If a company's business rescue proceedings have not ended within three months after the start of those proceedings or such longer time as the Court, on application by the practitioner, may allow, the practitioner must -
 - (a) Prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and
 - (b) Deliver the report and each update in the prescribed manner to each affected person and to -
 - (i) Court, if the proceedings have been the subject of a Court Order;
 - (ii) Commission, in any other case."

The report must be filed together with the duly completed Form CoR125.1, in accordance with Practice Note 3 of 2021 issued by CIPC on 28 July 2021.

Furthermore, in terms of Section 140 relating the general powers and duties of practitioners:

- (3). During a company's business rescue proceedings, the practitioner -
 - (a) is an officer of the Court and must report to the Court in accordance with any applicable rules of, or orders made by the Court;
 - (b) has the responsibilities, duties and liabilities of a director of the company, as set out in Sections 75 to 77; and
 - (c) other than as contemplated in paragraph (b) -
 - (i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of the practitioner; but

- (ii) maybe held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of the practitioner."

In terms of Section 150(5), the business rescue plan must be published by Sarah within 25 business days after the date on which she was appointed, or such longer time as may be allowed by -

- (a) The Court, on application by the company; or
- (b) The holders of a majority of the creditors' voting interests.

Accordingly, and given the delay by Sarah to publish the plan almost a year after the business rescue proceedings, she would be obliged to obtain an extension to do so in terms of Section 150(5)(a) or (b).

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]: 2 marks. Needed to discuss the definition of "related" and the provisions of section 2(1)(a) to (c) of the Companies Act. Needed to demonstrate why Mr Siwisa is not an independent creditor with reference to 'voting rights', 'control' etc.

No, Mr Siwisa is not an independent creditor of Khusela.

According to the definition of 'independent creditor' as defined in Section 128(1)(g), an independent creditor as defined as follows:

“(g) **'independent creditor'** means a person who -

- (i) Is a creditor of the company, including an employee of the company who is a creditor in terms of Section 144(2); and
- (ii) Is not related to the company, a director, or the practitioner, subject to Subsection 2;”

Mr Siwisa is a cousin of one of the directors of Khusela. Accordingly, he does not fulfil the requirements as set out in Section 128(g)(ii), and is not an independent creditor. None of the exclusions in Section 128(2) apply.

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 [M40]: 5 marks. Needed to state that (i) Sarah was required to publish the amended BR plan, (ii) shareholders are required to vote on the amended BR Plan to the extent that their rights were affected, and (iii) the amended BR plan would be adopted if the requisite majority of votes are in favour of the amended plan.

From the given facts, it is clear that Sarah amended Khusela's business rescue plan unilaterally after it had been approved. This is not permissible.

It is not permissible and she is not able to do so.

The requirements of implementing an amendment to the business rescue plan with reference to the Companies Act 2008 and appropriate case law

An adopted business rescue plan is binding on the company, and on each of the creditors of the company and every holder of the company securities in terms of Section 152(4).

Unless lawfully amended or set aside, the business rescue plan is a binding agreement on the business rescue practitioner and all affected persons.

The Companies Act of 2008 is silent on an amendment of a business rescue plan after its adoption. In the matter of *Kransfontein Beleggings (Pty) Ltd v Corelink Twenty Five (Pty) Ltd and Others (624/2016) [2017] ZASCA 131 (29 September 2017)*, if no business plan contains provisions for the amendment of such plan, the relevant provision should not:

- a. Permit unilateral amendments by the business rescue practitioner; and
- b. Attend to circumvent the procedures contemplated under Sections 145, 146 and 152 of the Companies Act 2008.

Also, in the matter of *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd* (in business rescue) and Another [2014] 1 SA 862 (WCC), the Court dealt with the position where amendments to a business rescue plan is lawful by a practitioner after such plan has been adopted. The Court held that the business rescue practitioner cannot do so and can not reserve a right to unilaterally amend the business rescue plan and circumvent any of the procedures set out in the Companies Act 2008. The Court further held that the business rescue practitioner does not have the power to impose on creditors a plan which they have not voted on and discussed in the manner contemplated by Section 152.

With regards to the requirements of implementing an amendment to the business rescue plan, this can only be done in accordance with Section 152(1)(d) at which meeting the business rescue practitioner must invite discussion and entertain and conduct a vote, on any motions to amend the proposed plan in any manner moved and seconded by holders of creditors' voting interest, and satisfactory to the practitioner, or direct the practitioner to adjourn the meeting in order to revise the plan for further consideration.

In terms of Section 153(1) of the Companies Act if a business rescue plan has been rejected, Sarah may seek a vote of approval from the holders of voting interest to prepare and publish a revised plan. In terms of Section 153(3), if, on the request of the practitioner in terms of Subsection 1(a)(i), or a call by affected person in terms of Subsection 1(b)(i)(aa), the meeting directs the practitioner to prepare and publish a revised business rescue plan, the practitioner must:

- a. conclude the meeting after that vote; and
- b. prepare and publish a new or revised business rescue plan within 10 business days.

In all of the circumstances above, it is clear that Sarah does not have the ability to unilaterally amend the business rescue plan, either during the process for the adoption thereof, or subsequent to its adoption.

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 terms of Section 150(2) (c)(iv), Proper Sound Engineering should expect to see in the business rescue plan the following:

1. A projected -
 - (a) balance sheet for the company; and
 - (b) Statement of income and expenses for the ensuing 3 years,
prepared on the assumption that the proposed business plan is adopted.
 - (c) A cash flow statement.

2. Projected balance sheet and statement required by Section 150(2)(c)(iv) -
 - a. Must include a notice of any material assumptions on which the projects are based; and
 - b. May include alternative projections based on varying assumptions and contingencies.

Question 20

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)

Commented [M41]: 0 marks. The question required you to list three key items you would expect to see in the financial projections of the BR plan, not what must be included in the BR plan.

Commented [M42]: 2 marks.

I would strongly advise Sarah to include a cash flow statement in her business rescue plan. Such a cash flow statement provides important information concerning, inter alia, cash received and cash paid over a period of time. Cash flow, which is fundamentally important in the meaningful rescue of a company and to alleviate financial distress, otherwise known as liquidity, is a useful tool to determine the financial health of a company and forecasts are useful to enable affected persons to make an informed and meaningful decision in voting on a business rescue plan. Also, a cash flow statement is an important indicator of potential risk factors effecting the outcome of a successful business rescue. Affected persons can assess the various proposals in the business rescue plan and make an informed decision regarding the likely success of the business rescue. Cash flow highlights the potential success of a business rescue and will further indicate any potential distribution which may be paid during the business rescue process, as well as highlights potential risks and cash flow problems during such process.

Question 21

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

Commented [M43]: 3 marks.

There are various advantages to the employees of Khusela being placed in business rescue rather than a liquidation scenario.

These include, inter alia, the following:

1. The employees are continued to be employed on the same terms and conditions during the business rescue process, and their contractual rights as an employee that existed at the commencement date of the business rescue proceedings remain enforceable by the employee as against the company, for the period of business rescue;
2. Their remuneration, reimbursement for expenses and all other employment related amounts during business rescue are regarded as post-commencement in finance, which enjoys preference over all other post-commencement claims incurred during the proceedings, irrespective of whether these are secured or unsecured - Section 135(1) of the Companies Act, and is regarded as post-commencement financing;
3. Such claims enjoy preference over all other post-commencement finance claims incurred during proceedings, irrespective of whether these are secured or unsecured claims. In a liquidation scenario employees only enjoy limited preference in terms of their preference claims, with a balance of their claims ranking as concurrent claims. During business rescue, the employees of contracts of employment cannot be terminated unless -
 - 3.1 Changes occur in the ordinary course of retrenchment; or
 - 3.2 The employees of the company, in accordance with applicable labour laws, agree different terms and conditions.
4. In liquidation scenario, an employees contract of employment automatically terminates;

5. Insofar as their claims for monies owing arising out of their employment is under the business rescue process, these claims continue to enjoy preference even if the company is placed into liquidation;
6. In terms of Section 144 of the Companies Act, and insofar as claims arose in favour of the employees arising out of the employment at any time before the commencement of business rescue proceedings, and had not been paid, the employee is a preferred unsecured creditor of the company for the purposes of this chapter - see Section 144(2);
7. Any statutory preference conferred on the employees in terms of the Companies Act is not permitted to be compromised in a business rescue plan - see South African Pilots Association and South African Airways (2021) (6) BLLR 627 (LC).
8. Employees are entitled to vote at a meeting to adopt a business rescue plan;
9. All of the above provide security of employment and payment of amounts owing in terms of the employment contract, during the business rescue process, and the implementation of the business rescue plan, which security is not afforded to them during a liquidation scenario.

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

TOTAL MARKS: [100]