



INSOL
INTERNATIONAL



PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023

Commented [BB1]: TOTAL = 72/100

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)

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

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: 14 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]: 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]: 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]: 0 marks

Choose the **correct** statement:

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

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

Question 1.10

Commented [M12]: 1 mark

Choose the **correct** statement:

You are a member of SARIPA and were certified by CIPC for the first-time last year to practice as a junior business rescue practitioner after you completed the INSOL SARIPA Programme in South African Business Rescue. Since then, you have accepted appointment as the business rescue practitioner of one small company and are busy implementing the business rescue plan that was adopted by creditors in that matter. You have been

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

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

Your answer is:

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

Question 1.11

Commented [M13]: 1 mark

Choose the **incorrect** statement:

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

Question 1.12**Commented [M14]:** 1 mark

Choose the **correct** statement:

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

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

Question 1.13**Commented [M15]:** 1 mark

Choose the **correct** statement:

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

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

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

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

Question 1.14

Commented [M16]: 1 mark

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

Commented [M17]: 1 mark

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?

- (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]: 0 marks

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]: 0 marks

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

Commented [M23]: 2 marks out of 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)

Sect 1331(1) of the Companies Act, 71 of 2008 ("**the Act**") stipulates that during business rescue proceedings, no legal proceeding, including enforcement action against the company or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum except with (i) written consent of the practitioner ("**BRP**") or (ii) with leave of the court.

The Act does not define the terms "*legal proceedings*" or "*enforcement action*". The meanings of the respective terms have however subsequently been dealt with by the South African courts.

The court in *Blue Star Holdings (Pty) Ltd v West Coast Oyster Growers CC 2013 (6) SA 540 (WCC)* held that the intention of sect 133 is to *cast the net as wide as possible in order to include any conceivable action against the company such as liquidation proceedings*.

In *Murray and Another NNO v Firstrand Bank Ltd t/a Wesbank 2015 3 (SA) 438 SCA*, The Supreme Court of Appeal ("SCA") held that "the moratorium provided by sect 133 was of *critical importance since it provides for a crucial breathing space or a period of respite to enable the company to restructure its affairs*." The court further held that "*enforcement action*" was a species of legal proceedings and more specifically with reference to the definition of "*any forum*" being a court or tribunal.

Applied to the facts, the application for money judgement by Opera Sound Engineering (Pty) Ltd in the high Court of South Africa KZN Division, against Khusela Entertainment (Pty)

Ltd ("**the Company**") would be stayed and Opera will not be able to enforce its rights against Khuesala while being in business rescue.

Question 3

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

Sect 150(2) of the Act provides that a proposed business rescue plan will be approved on a preliminary basis if :

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

In terms of sect 150(3)(b) if a proposed plan does not alter the rights of holders of any class of the company's securities, approval on a preliminary basis i.t.o sect 150(2) will also constitute the final adoption of the plan subjects to all conditions of the plan being met.

However, if the proposed plan does alter the rights of any class of holders of the company's security, the BRP is obliged i.t.o sect 152(3) to immediately hold a meeting of the holders of the class or classes of securities who's right would be affected by the plan and call for a vote to approve the proposed plan. If the simple majority vote in favour of the plan the plan will be considered to have been finally adopted subject to all conditions of the plan being met.

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)

In terms of sect 154(2) of the Act, if a business rescue plan has been approved/adopted and implemented in accordance with Chapter 6, a creditor is not entitled to enforce any debt owed by the company immediately before the commencement of business rescue proceedings except to the extent provided for in the business rescue plan.

The effect of the adoption of the plan is that the plan become a binding agreement between the BRP/Company and all affected parties. This provision is commonly referred to as the "cram-down" provision.

The plan is therefore binding on the company and each of its creditors, and every holder of the company's securities irrespective of whether such person was present at the meeting, voted for or against the plan or had proven claims against the company (or not).

Commented [M24]: 2 out of 3 marks. No reference to section 152(2)(a) and (b).

Commented [M25]: 3 out of 3 marks.

The plan is therefore binding on Opera Sound Engineering irrespective of whether it voted against the plan.

The SCA in *Van Zyl v Auto Commodities (Pty) Ltd 2021 3 All SA 395 (SCA)* held that although the effect of sect 154(2) that a credit cannot enforce the debt, the inability to enforce (the cram-down) does not equate to a discharge of the debt.

Sect 154(2) therefore provides the company with a personal defence against any enforcement action of Opera's pre-business rescue claim.

Sect 154(2) is not to be confused with sect 154(1).

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)

The definition of "Financial Distress" is set out in sect 128(1)(f) of the Act, which stipulates that financial distress in relation to a company at a particular time means:

- (i) it appears to be reasonable unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months (commonly referred to as commercial insolvency having regard to the cash flow); or
- (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months (this is commonly referred to as factual insolvency i.t.o which the liabilities exceed the assets).

The test is therefore a "forward looking".

In this case the board of directors were still contemplating its options i.t.o business rescue while the company was not able to pay its critical suppliers and landlords and employees (Commercial insolvency in accordance with sect 128(1)(f). In terms of sect 129(1)(a) the company was obliged to commence business rescue proceedings.

If the company was already in the position where it cannot pay its debts as they fall due, the company is clearly insolvent (commercially at least) and not a candidate for business rescue. In this circumstances liquidation would be the preferred option.

It can be argued that Universal Properties did not have insight to the company's financials (balance sheet) and based its application to place Khusela under supervision purely on the commercial insolvency at the time i.e. inability to pay its debts as they fall due.

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

The fact that the BRP eventually determined that the adopted plan cannot be implemented, and the company cannot be rescued is indicative of the fact that at the time the application was brought by Universal Properties to commence business rescue proceedings the company was already insolvent and therefore too late. Liquidation should have been the preferred option.

Question 6

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

In terms of sect 131(6) of the Act, if liquidation proceedings have already been commenced by or against the company at the time of the time an application is made in terms of sect 131(1), the application will suspend those liquidation proceedings until

- (i) a court has adjudicated on the application; or
- (ii) the business rescue proceedings ends if the court makes the order applied for.

Based on the facts provided, Universal as affected person, brought an application i.t.o sect 131 to place Khusela under business rescue by way of court order (compulsory commencement)

If we were to assume that the liquidation application by World Music had already been served and filed at the High Court, the application to place Khusela under supervision by Universal in terms of sect 131 of the Act will suspend the liquidation proceedings until the court has adjudicated the application or the business rescue proceedings ends if the court makes the order applied for.

An application i.t.o sect 131 of the Act to place a company under business rescue can be made "at any time", even after the final liquidation order has been issued. This was confirmed in the SCA judgement of *Richter v Absa bank Limited 2015 (5) SA 57 (SCA)*.

The court in Van Der Merwe and Others v Zonnekus Mansion (Pty) Ltd (in liquidation) and Another (Commissioner of the South African Revenue Service and another intervening parties) [2017] JOL 39477 (WCC) confirmed that the Richet decision is in agreement with the legislatures intention as set out in sect 132(1) of the Act i.e. that if a company is already in liquidation (as assumed in this case), business rescue begins when a court places the company under supervision

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, Standard Bank of South Africa Limited v Gas2Liquids (Pty) Ltd 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.

In *Jansen Van Rensburg NO and Another v Cardio-Fitness Properties (Pty) Ltd and Others* [2014]31979 (GSJ) 58 the court held that the assets of a company in liquidation remain in the custody and under the control of the provisional liquidator until a business rescue practitioner or final liquidator has been appointed, despite the application for business rescue i.t.o sect 131.

It must however be noted that the process of winding-up is suspended and not the legal consequences of a winding-up order. This was confirmed in the SCA judgement of *GCC Engineering (Pty) Ltd and Others v Maroos and Others 2019 (2) SA 379 (SCA)* where the courts stated that sect 131 of the Act *does not change the status of the company in liquidation, nor does it suspend the court order that placed the company in liquidation. The appointment, office and powers of the liquidator are not suspended but rather the suspension of the actions performed by the liquidator ("the liquidation proceedings) in dealing with the affairs of the company.*

In summary the liquidating proceedings of Word of Music against the company would be suspended i.t.o sect 131(6).

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)

The unperfected General Notarial Bond ("GNB") confers neither a security nor a title interest to Crypto Bank.

The GNB only confers a preference to Crypto Bank upon liquidation and only after statutory preferent creditors and before unsecured creditors.

Commented [M28]: 2 marks out of 2.
Excellent answer.

In order for secured rights to vest in the holder of a GNB and thereby elevated to a secured creditor, the creditor must have taken possession and control of the assets subject to a court order prior to commencement of business rescue.

In this set of circumstances Crypto Bank will only be able to perfect the GNB with the consent of the BRP in terms of sect 133(1) of the Act (the moratorium on legal proceedings) and thereby elevating its status to that of secured creditor. We can assume that the BRP did not consent to the perfection.

The assets which form subject to the GNB remain unsecured and the BRP will be able to utilise or sell the assets in the normal course of business.

Question 7.2

Commented [M29]: 4 marks.

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

The BRP will be able to sell the assets (to which Crypto Bank holds no security or title interest) subject to the provisions of sect 134 of the Act, which stipulate that 134(1) during a company's business rescue proceedings (a) the company may dispose or agree to dispose of property only:

- (i) in the ordinary cause of business; or
- (ii) in a bona fide transaction at arms-length, for fair value, approved in advance and in writing by the BRP; or
- (iii) in a transaction contemplated within and undertaken as part of the implementation of a business rescue plan that has been approved i.t.o sect 152

Question 8

Commented [M30]: 5 marks.

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)

Post commencement finance is critical to achieve the objectives of business rescue.

In terms of sect 135(2) of the Act the company may during its business rescue proceedings obtain financing and

- (i) such financing may be secured to the lender by utilising any assets of the company to the extent that it is not otherwise encumbered; and
- (ii) will be paid in order of preference set out in subsection (3)(b)

However, both the book debts and the rights under the material distribution agreement (collectively referred to as "the asset") has been ceded to Crypto Bank as security (assumingly *in securitatum debiti*) for a revolving facility of caR100m afforded to the company.

Crypto Bank therefore has a security interest in the book debts and proceeds of the material distribution agreement.

The BRP is therefore unable to agree to sell the proceeds of Khusela's existing material agreement as security for the PCF and pay the proceeds over to them for the following reasons:

- (i) firstly the assets are not unencumbered; and
- (ii) secondly and in terms of sect 134(3) of the Act the BRP cannot dispose of the asset i.e. the book debt and/or proceeds of the existing material distribution agreement without the secured creditor's (Crypto Bank) consent.

In *Van Heerden NO and Others v Van Tonder 2021 ZAGP JHC 486* the court held that book debts constitute "property" for purposes of sect 134(3) and that "disposal" in the context of sect 134(3) also means to "to deal with or settle", "to give", "sell" or transfer to another and that the property may not be disposed of without the consent of the Cessionary (in this case Crypto Bank).

Other authority on this issue can be found in *Kritzinger and Another v Standard Bank of South Africa Ltd (3034/2013) [2013] ZAFSHC 215*.

In an attempt to assist the company to secure PCF, Crypto Bank can potentially agree to the disposal/transfer of the asset i.t.o sect 134(3) to Easy Access PCF as security for the PCF to be provided and Crypto may suggest that the BRP provide replacement security for the value of the asset (cession of book debt and proceeds of material distribution agreement) in lieu of the transfer. Whether there are other unencumbered assets which the BRP can offer to Crypto in exchange for the cession of book debt and proceeds of the distribution agreement is however doubtful. We can assume that there are no other unencumbered assets hence the request from Easy Access to sell the proceeds of the material distribution agreement and pay it over to them.

Question 9

Commented [M31]: 6 marks out of 7. Needed to state that the BRP could issue voluntary severance offers to all affected employees, subject to any collective agreements.

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)

The status and rights of employees, as affected persons, is an essential part of business rescue proceedings and is entrenched in the provisions of Chapter 6 of the Act, Chapter 6 however does not supersede the provisions of the Labour Relations Act ("LRA").

Sect 136(1)(a) of the Act stipulates that during business rescue employees of the company immediately before the beginning of those proceedings continue to be employed on the same terms and conditions, except to the extent that:

- (i) changes occur in ordinary course of attrition;
- (ii) the employees and the company in accordance with the labour laws agree different terms and conditions and
- (iii) any retrenchment of any such employees contemplated in the company's business rescue plan is subject to sect 189 and 189A of the Labour Relations Act, 66 of 1995 and other applicable employment legislation

The provisions of sect 136(1) confirms the corner stone on which business rescue is based being the preservation of employment.

In terms of sect 136(1)(b) the BRP has the power to cancel contracts either entirely, partially or conditionally. However the BRP therefore does not have the statutory power to amend or cancel any contract of employment or any aspect of employment without the express consent of the employees concerned.

Sect 136(1)(b) ensures that the adopted business rescue plan does not give the company the right to retrench employees without following the procedures set out in the LRA and does not create a moratorium on retrenchments.

The contractual rights of employees as set out in Chapter 6 remain enforceable against the company for the period of business rescue subject only to relevant labour legislation such as the LRA and Basic Conditions of Employment Act.

Any unilateral amendment of the terms and conditions of employment (such as salaries or benefits etc.) by the BRP would be deemed to be unfair labour practice and unlawful.

Business Rescue proceedings sometimes (as in this instance) requires reduction of salaries and even retrenchment to reduce the salary obligations or burden on the company. This however will require a collective agreement between the employees and the BRP and the BRP would be required to commence with a sect 189 consultative process i.t.o the LRA as it may have an effect on the rights of employees.

It must be noted that the sect 189 consultative process must commence at any time when rights of employees are affected.

Sect 189 can also be utilised to reach consensus with employees as to the extent of salary reductions as an alternative to retrenchment.

The Labour Court in *South African Airways SOC Ltd and Others v National union of Metalworkers of South Africa obo of members and Others [2021] 6 BLLR 627 (LC)* held that *sect 136(1)(b) requires that any retrenchment contemplated during proceedings must be dealt with in a business rescue plan AND there is nothing in the Act that empowers the BRP to retrench employees in the absence of an adopted business rescue plan.*

In contradiction to the aforementioned, the Labour Court held that nothing prevents the BRP from offering voluntary retrenchment before the publication of the business rescue plan. Offering of retrenchment packages however suggest that retrenchment have been considered before publication of the plan and as such would trigger sect 189 of the LRA.

Based on the SAA judgement, the BRP did not follow the correct approach however in this scenario the BRP commenced sect 189 consultative process the moment that the rights of employees were affected i.e. potential retrenchments. It also appears that she did not unilaterally amend the terms and conditions of employment.

Having regard to the SAA judgment the retrenchments i.t.o sec 131(1)(b) should have been dealt with in the proposed business rescue plan. In this case it appears that this was done prior to publication and adoption of the plan.

In the absence of any facts to the contrary, the consultative process i.t.o sect 189 also appears to have been by way of collective agreement between all parties.

The facts also do not suggest that there was any dispute between the BRP and the employees and their represented trade unions in respect of the opinion obtained re employment or the process to be followed.

Having considered the complexity and urgency of the matter as well as the various challenges related to retrenchment proceedings pre-publication of a business rescue plan, it would appear that the BRP did reasonably attempt to comply with the provisions of sect 189.

To the extent that the BRP unilaterally amended the terms and conditions of employment and did not provide for it in the business rescue plan, an employee would have the right to approach the Labour Court for urgent relief as such actions by the BRP would be unlawful.

The facts however do not suggest that the BRP unilaterally amended the terms and conditions of employment.

Question 10

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

In terms of sect 128(1)(a) registered trade union representing employees of the company and if not represented by a trade union, each employee or their representative are deemed to be an "affected person"

In terms of sect 144(1) of the Act employees of the company who (i) are represented by a registered trade union may exercise any rights set out in Chapter 6 (i) collectively through the trade union and (ii) in accordance with applicable labour law or (b) employees not presented may elect to exercise any rights either directly or by proxy through an employee organization or representative.

To the extent that an employee is a creditor of the company, it is further entitled i.t.o sect 145 of the Act to: (i) notice of each court proceeding, decision, meeting or relevant events, (ii) participate in any court proceeding arising during business rescue, (iii) formally participate in the business rescue proceedings by making proposals for a business rescue plan, (iv) the right to vote to amend, approve or reject a proposed plan

Commented [M32]: 1 mark. Needed to discuss the rights of employees specifically and detail each of their rights (see section 144(3)). The participation rights of creditors under section 145 are not applicable to this question, as the question relates to employees in that capacity.

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)

In terms of sect 137 of the Act, during business rescue each director:

- (a) must continue to exercise the functions of director subject to the authority of the BRP (who has full management control of the company ito sect 140 of the Act)
- (b) has a duty to exercise any management function within the company in accordance with the express instructions and direction of the BRP to the extent that it is reasonable to do so;
- (c) remains bound by the requirements of sect 75 concerning personal financial interest of directors or related persons; and
- d) to the extent that the director acts in accordance with par (b) and (c) , is relieved from the duties of a director as set out in sect 76 and the liabilities set out in sect 77 (other than sect 77(3), (b) and (c))

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)

In terms of sect 150(1) of the Act the BRP, after consulting the creditors, other affected persons and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting i.t.o sect 151 of the Act.

In *Hlumisa Investments Holdings (RF limited and Another) v Van Der Merwe NO and Others* [2016] JOL 34326 (GP) the court held that there is a clear distinction between "informing" and "consulting".

Commented [M33]: 2 marks out of 3. Needed to apply the legal principles to the facts.

Commented [M34]: 5 marks.

The court made reference to Rogers J, who considered various cases in the matter of *Scalabrini Center Cape Town and Others v Minister of Home Affairs and Others 2013 (3) SA 531 (WCC) at 72* and held that: "... at a substantive level, consultation entails a genuine invitation to give advice and a genuine receipt of that advice." Consultation is therefore not merely formality and any engagement after the decision maker has reached a decision is not compatible with true consultation and while consultation may be procedurally conducted in any manner determined by the decision-maker, the procedure must enable consultation in the substantive sense i.e. a genuine invitation to give advice and receive advice.

Informing affected persons after the fact is therefore not deemed to be consultation as envisaged in sect 150(1) of the Act.

The BRP is therefore obliged to properly engage with effected persons to hear their views and take it into account before finalising the business rescue plan.

In the event that the BRP fail to consult and publish a plan and convene a meeting i.t.o sect 151 to consider the plan, an affected persons could potentially approach the court on an urgent basis to interdict the meeting i.t.o sect 151 pending proper consultation.

Question 13

Commented [M35]: 2 marks. Great answer.

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 sect 143(2) at all of the Act, the BRP 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 a contingency related to:

- (i) the adoption of a business rescue plan or within a particular time or the inclusion of any particular matter within such plan; or
- (ii) the attainment of any particular result or combination of results relating to the business rescue proceedings.

The agreement contemplated i.t.o sect 143(2) is final and binding on the company if approved by

- (i) the holders of a (simple) majority of creditor's voting interests, as determined in accordance with sect 145(4) and (6) present and voting at a meeting called for purposes of considering the proposed agreement; and
- (ii) the holders of a (simple) majority of 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 to consider the proposed agreement.

Question 14

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

In terms of sect 143(1) the BRP is entitled to charge an amount to the company for the remuneration and expenses of the BRP in accordance with the tariff described in terms of subsection (6) and the relevant regulations. This is also referred to as the statutory fees.

The company is considered a large company being a company whose most recent public interest score as calculated i.t.o regulation 26(2) is 500 or more.

In terms of regulations 26(2) the public interest score at the end of each financial year, is calculated as the sum of

- (i) a number of points equal to the average number of employees of the company during the financial year - by the end of the 2021 Khusela had 2000 employees and if we assume that nothing materially has changed then we can assume it had 2000 employees in the 2022 financial year which is tantamount to 2000 points;
- (ii) one point for every R1m in third party liability of the company - during the 2022 financial year the third party liability to Crypto Bank alone was R100 000 000 which is tantamount to a further 100 points;
- (iii) one point for every R1m in turnover of the company e - no information is available with regards to the turnover although it could safely be assumed that turnover was substantial.

The company therefore had a Public Interest Score of at least 2100 (based on (i) and (ii) above) which would then be considered to be a large company for purposes of regulation 26(2)

The basic remuneration of a BRP as contemplated in sect 143(1) may not exceed R2000 per hour (excluding VAT) to a maximum of R25 000 per day as the company has a Public Interest Score in excess of 500.

In addition to the remuneration i.t.o sect 143(1) the BRP is entitled to reimbursements for actual cost of any disbursement made by the BRP or expenses incurred to the extent reasonably necessary to carry out the BRP's function.

Commented [M36]: 2 marks. The tariff amounts are inclusive of VAT.

In terms of sect 143(2) the BRP may propose an agreement with the company providing for further remuneration as a success fee. It does not appear from the facts that any such fee arrangement was entered into with the company and/or approved by simple majority of creditors i.t.o sect 143(3) and is such will only be entitled to the statutory fees.

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)

A BRP has a duty to investigate the company's affairs, business, financial affairs and property/assets as soon as practically possible after appointment.

It is suggested that the BRP commence her investigations as part of the assessment of the company pre acceptance of the appointment and commencement of business rescue. This would enable her to comply with her duty i.t.o sect 147(1)(a) at the 1st meeting of creditors.

Sect 147(1)(a) of the Act specifically provides, among others, that a BRP

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

However, from the facts provided, there is no evidence that the BRP complied with sect 147(1)(i) i.e to opine on the reasonable prospect of rescuing the company. Based on the facts provided the BRP only commenced investigation of the affairs of the company after the 1st meeting of creditors and only after her investigation concluded that there is a reasonable prospect to rescue the company.

The BRP should therefore have informed the creditors whether she believes that there is a reasonable prospect of rescuing the company. For all intend and purposes the same meaning attributed the term "reasonable prospect" should be interpreted the same

manner as would be in relation to requirements for commencement of business rescue i.t.o sect 131(4) of the Act.

The BRP further has a duty i.t.o sect 141(2) of the Act to regularly and continuously assess whether there is a reasonable prospect of rescuing the company. This will also assist in her duty to develop a business rescue plan i.t.o sect 150.

Failure to comply with the provision of sect 141 and sect 147(1) will at best be a breach of her duties contemplated in sect 139(2)(a) and at worst considered to be reckless and potentially could have served as grounds for her removal of the practitioner. Nothing in the facts suggest that affected parties sought any relief to have the BRP removed.

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 sect 150(5) of the Act provides for publication of the business rescue plan within 25 days after the date on which the practitioner was appointed or such longer time as may be allowed by:

- (i) the court on application by the company; or
- (ii) the holders of a (simple) majority of creditor's voting interests.

Based on the facts, it can safely be assumed that it is practically impossible for the BRP to publish the plan within the 25-day period provided for in sect 150(5). In practice it is also common practice that plans are not published within the required 25 days.

Under the circumstances the BRP should have pro-actively engaged the creditors and requested an extension of time within to publish the business rescue plan as set out in sect 150(5)(ii).

If the BRP fail to obtain the consent of creditors to extend the time within to publish the business rescue plan, the BRP is at liberty to apply to court for the required extension, however such application is potentially time consuming and costly. It is therefore preferable that the BRP properly motivate the request for an extension i.t.o of sect 150(5)(ii) to avoid approaching the court for the necessary relief.

In *Shoprite Checkers (Pty) Ltd v Berryplum Retailers CC and others (47327/2014 [2015] ZAGPPHC 255*, Tuchten J found that the failure of a company under business rescue to

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

publish a proposed business rescue plan within the 25 day period prescribed in sect 150(5) did not in itself put and end to business rescue process.

Sect 132(2) of the Act further does not stipulate that failure to publish the plan within the required time periods i.t.o sect 150(5) will result in termination of business rescue proceedings.

Question 17

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

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

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

In terms of sect 128(1)(g) of the Act and "*Independent Creditor*" is defined as a person who is:

- (i) a creditor of the company, including an employee of the company who is a creditor i.t.o sect 144(2) of the Act; and
- (ii) is not "related" to the company, a director or the practitioner subsection (2)

Sect 1 of the Act defines "related" to mean that when used in the context of two persons, persons who are connected to each other in any manner contemplated in sect 2(a) to (c). Sect 2(b) state that an individual is related to a juristic person (the company) if the individual directly or indirectly controls the juristic person. Mr Siwisa in his capacity as shareholder of the company is therefore deemed related and not an independent creditor.

Mr Siwisa in his capacity as shareholder is considered to be an "affected person" i.t.o sect 128(1)(a)(i).

Mr Siwisa will however not be deemed to be an independent creditor of the company due his shareholding in Khusela and based on his relation to one of the directors of the company.

As far as it relates to the claim against Khusela in respect of the loan, Mr Siwisa (as shareholder) of Khusela will be deemed to be a non-independent creditor. In terms of sect 152(2) of the Act any voting rights afforded to Mr Siwisa will be based on his status as a non-independent creditor.

Commented [M39]: 2 marks. Needed to discuss 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 the Companies Act. Conclusion needs to be based on the fact that Mr Siwisa together with a related person (Ms Phillips) control Khusela by virtue of a combined 51% shareholding.

Mr Siwisa will further be entitled to exercise his vote in his capacity as non-independent creditor to the extent that the proposed plan alter the rights of the holders of the company's security. In this instance Mr Siwisa owns 25% of the shares in the company.

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)

Chapter 6 contains no provision for the ability to amend an approved business rescue plan in terms of sect 152(2). This was confirmed in the judgment of *LSO Consulting Engineers (Pty) Ltd and another v Ndyamara and others [2022] ZAGPPHC 49 (26 January 2022)*.

Once a plan is adopted it becomes binding on the company and each of its creditors and every holder of securities. (The cram down principle as set out in Sect 154(2)).

In *Booysens v Jonkheer Boerewynmakery (Pty) Ltd (in business rescue) and another [2017] a All SA 862 (WCC) and (4) SA 51 (WV)* the plan provided for the reservation of right of the BRP to amend, vary and modify the plan subject to certain limitations. One of the limitations is that the amendment is not prejudicial to any of the affected persons and that the BRP act reasonably. The court held that *there is no room for a BRP to reserve the right to amend the business rescue plan and by doing so the BRP would circumvent the provisions of sect 154(2). The right to amend the plan could, at best, be the right to amend the proposed/draft plan prior to its adoption.*

The court also held that the reservation of the right to amend a business rescue plan must be seen in the context of a particular plan.

In *Arqomanzi (Pty) Limited v Vantage Goldfields (Pty) Limited (in business rescue) and others 2019 JDR 2506 (MN)* the only impediment on successful implementation of two related business rescue plans was the lack of PCF funding. The court held that the amendment of a plan to include the identity of post commencement funders is permitted and that such amendment is not contrary to the purpose of the Act. What is of importance is that the amendments would have to be adopted by creditors in a similar process to a section 151 meeting i.e the plan must be approved in terms of the thresholds as sect 152() of the Act.

Commented [M40]: 7 marks. Needed to state that the shareholders are also required to vote on the amended business rescue plan to the extent that their rights are affected.

In the LSO case referred to above, the amendments dealt with the dividend to be received by unsecured creditors. In this case the amendments were circulated, and the amendments were adopted by a simple majority (62.4% of the voting interest). The court however held that the amendment by simple majority is not consistent with the required thresholds as set out in sect 152(2) of the Act i.e 75%.

Based on the aforementioned case-law and the absence of any provision in the act for the BRP to unilaterally amend a business rescue plan the following course of action is to be considered by the BRP.

The BRP may incorporate a provision in the plan that it has the right to amend the adopted business rescue plan subject to:

1. the amendment being “material” to give effect to the plan;
2. “material” must be defined at minimum as no prejudicial amendment to the dividend payable to creditors in terms of the plan and no extension of time-frames stipulated. Mere administrative amendments to the plan like in the correcting errors, spelling mistakes etc plan will not be considered to be material and would not compel the BRP to obtain the creditors consent;
3. the BRP must act reasonably;
4. The amendments be circulated to all affected persons by way of formal notice;
5. A meeting be scheduled in terms of sect 151 by way of formal notice in terms of which the amendments are to be considered and approved by creditors. In terms of the provisions of sect 152(2) the amendments would then be approved if (i) supported by the holders of more than 75% of creditor’s voting interest that were voted and (ii) the votes in support of the proposed amendments included at least 50% of independent creditor’s voting interest, if any, that were voted.

It is further assumed that the normal consequences of voting on the amended plan i.t.o sect 153 would apply.

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 sect 150(2)(c)(iv) of the Act no cash flow forecast is required for purposes of a business rescue plan. Sect 150(2)(c)(iv) only requires a projected (i) balance sheet for the company and (ii) statement of income and expenses for the ensuing three years.

The three key items in financial projections are:

Commented [M41]: 1 mark. The question required you to list items that you would expect to see as part of the financial projections of the BR plan and not what must be included in the BR plan.

1. Balance Sheet – overall financial position of the company and speaks to factual solvency of the company i.e. assets v liabilities
2. Income Statement – reflection of the financial performance or profitability of the company over a given period; and
3. Cash Flow Statements – speaks to liquidity and provides information i.r.o cash inflows and outflows over a given period and is crucial to determine viability of a proposed plan.

Forecasts (i) forms the basis on which dividend will be paid, (ii) provides transparency into the process, (iii) allows affected parties to assess the likelihood of success and (iv) gages the solvency of the company for purposes of substantial implementation.

For purposes of Opera Sound Engineering the cash flows will be extremely important as it will provide clarity on the company's ability to make payments of dividends in terms of the proposed plan.

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)

Although no cash flow forecast is required in terms of sect 150(2)(c(iv) for purposes of a business rescue plan, cash flow (or commonly referred to as liquidity) is considered the most important indicator of the viability of the proposed plan.

The forecast therefore provides the creditors with clarity on the future cash flows of the business, especially if profits of the business is materially different to the cash flows.

The cash flows are further indicative of sufficient cash flows being generated to make payments of dividends as provide for in the proposed plan.

It could further highlight any potential risk related to cash flows.

The cash flow projections provide creditors with comfort and certainty of the company's commercial solvency i.e its ability to pay its debt as per the proposed plan.

Cash flow projections allow creditors to make an informed decision in respect of the proposed business rescue plan and provides details i.r.o the key sources of finance. AS an example, the generation of cash might be a key to retain key clients post business rescue, and in the absence thereof the business will be unable to make payments as per the proposed plan or as they fall due post termination of business rescue.

The BRP must exercise a level of professional judgment and assess the level of information provided and if possible, include cash flow statements as part of best practice.

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)

In Business Rescue employees are afforded statutory protection in three ways:

1. Employee contracts are recognised and the powers of the BRP to encroach on their contractual right are limited. Sect 136(1)(a) of the Act applies. In liquidation the contracts are however suspended and will terminate, and the employees will have a limited claim i.r.o unpaid salaries i.t.o sect 98A of the Insolvency Act.
2. The Act incorporates labour law protection and requires that any retrenchment contemplated in the business rescue proceedings must be i.t.o sect 189 and 189A of the Labour Relations Act.
3. Employees that continue to render service to the company while under business rescue, become post commencement creditors in so far as their claims for remuneration arises during business rescue and is payable i.t.o sect 135(1) of the Act.

*** END OF ASSESSMENT ***

TOTAL MARKS: [100]