



INSOL
INTERNATIONAL



PROGRAMME IN SOUTH AFRICAN BUSINESS RESCUE 2023

Commented [BB1]: TOTAL = 66/100

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: 16 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]: 0 marks

Choose the **correct** statement:

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

X Bank may:

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

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

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

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

Question 1.7

Commented [M9]: 1 mark

Choose the **correct** statement:

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

(a) a business rescue cost.

(b) post-commencement finance.

(c) a preferent claim.

(d) a secured claim.

(e) an unsecured claim.

(f) a damages claim.

Question 1.8

Commented [M10]: 0 marks

Choose the **correct** statement:

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

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

Question 1.9

Commented [M11]: 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]: 0 marks

Choose the **correct** statement:

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

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

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

Your answer is:

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

Question 1.11

Commented [M13]: 1 mark

Choose the **incorrect** statement:

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

Question 1.12

Commented [M14]: 1 mark

Choose the **correct** statement:

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

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

Question 1.13

Commented [M15]: 1 mark

Choose the **correct** statement:

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

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

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

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

Question 1.14

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]: 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)

[In terms of section 133 (1) of the Companies Act 2008, no legal proceedings including enforcement action may be commenced or proceeded with against a company that is in business rescue or any property that belongs to it.

Khusela therefore enjoys a moratorium on legal proceedings while in business rescue and the creditors who have taken legal action against it will not be able to proceed with it or any enforcement action while the company is in business rescue save for if they have written consent from the business rescue practitioner or leave of the court.]

Question 3

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

[In terms of section 152(2) of the Act, a proposed business rescue plan will be deemed to be approved on a preliminary basis if:

- (a) It is supported by the holders of more than 75% of the creditors voting interest who voted; and
- (b) The votes in support of the proposed business rescue plan include at least 50% of the independent creditors voting interest (if any) that voted.

Commented [M23]: 2 marks out of 2. Good answer.

Commented [M24]: 3 out of 3 marks.

In terms of section 152(3), if the proposed business rescue plan does not alter the rights of the holders of any class of the company's securities, then the approval of the plan as I have outlined above, will also constitute the final adoption of the plan.

Section 152(3) provides that if the proposed business rescue plan does affect the rights of any class of holders of the company's securities, the business rescue practitioner must hold a meeting immediately of the holders of such security whose rights will be affected and call for a vote by them to approve the adoption of the business rescue plan.]

Question 4

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

[In terms of section 152(4) of the Act, once a business rescue plan has been adopted, it is binding on the company, all the creditors of the company and the holders of the company's security irrespective of whether such creditor was present at the meeting, voted in favour of the adoption of the plan or had proven their claim against the company.

Section 152(2) of the Act provides that if a plan is implemented in accordance with the Act, a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process except to the extent provided for in the plan.

This position was also confirmed in the case of *Stalcor (Pty) Ltd v Kritzinger NO* and others where the court held the applicant failed to make out a case for why an adopted plan ought to be amended/varied and as such the adopted plan remained binding on all creditors including the applicant who was not satisfied with its claim amount as reflected in the adopted plan.

The adopted business rescue plan is therefore binding on Opera Sound Engineering even though they voted against the adoption of the plan.]

Question 5

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

[Section 128(1)(f) of the Act defines financial distress as reference to a particular company at any particular time appearing to be reasonably likely not to be able to pay all of its debts as they become due and payable within the immediately ensuing six months or it appears

Commented [M25]: 3 out of 3 marks.

Commented [M26]: 2 marks out of 5. Needed to discuss the principles in *Gormley v West City Precinct Properties (Pty) Ltd* and *FirstRand Bank v Lodhi 5 Properties Investment*. Needed to discuss the 'just and equitable' ground for a BR order. See *Tyre Corporation Cape Town v GT Logistics*.

to be reasonably likely that the company will be insolvent within the immediately ensuing six months.

The above definition clearly prescribes a test which requires a reasonable assessment of what the future financial prospects of the company is. The directors of a company are therefore given a period in which to consider what the future prospects of the company will be and to place it in business rescue before its too late should its cash-flows and balance sheet indicate a potential inability to pay creditors by the company in the ensuing six months.

It must be noted that there is a distinction between “insolvent” and “financial distress”. Only companies that are financially distressed should be allowed to file for business rescue proceedings. This distinction was confirmed in the case of *Kovacs Investments 571 Ltd v Investec Bank Ltd* that business rescue proceedings are only available to financially distressed companies and not to companies that are hopelessly insolvent.

In the case of *Welman v Marcelle Props 193 CC JDR 0408 (GST)*, the court stated that “business rescue proceedings are not for terminally ill close corporations. Nor are they for chronically ill. They are for ailing corporations, which given time will be rescued and become solvent”. This statement supports the contention that at the first signs of financial distress, a company should apply for business rescue.

Therefore in order to determine the eligibility of Khusela to enter business rescue, we must consider whether the company was factually insolvent or commercially insolvent and therefore would not be able to pay debts in the next ensuing six months. In this particular matter, although Khusela had some financial problems in the 2022 financial year, they had secured lending which would allow them to continue operating and in fact the company had begun to recover from its financial decline.

What ultimately led to the significant revenue shortfall was the unforeseen exit of its biggest artists (and largest contributors to revenue). The directors should have immediately taken action at this time and not wait for creditors and employees to go unpaid for a significant period of time.

It was therefore too late for a business rescue order to be issued by the time the landlord decided to bring this application.]

Question 6

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

[In terms of section 131(6), if liquidation proceedings have already been commenced with against the company at the time that an application to begin business rescue is made in

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.*

terms of section 131(1), the application (for business rescue) will have the effect of suspending the liquidation proceedings until the court has adjudicated upon the business rescue application or the business rescue proceedings end should the court make the order applied for.

In *Firststrand Bank Ltd v Imperial Crown Trading 143 (Pty) Ltd*, the court held that section 131(6) provides that if the application for business rescue after adjudication is refused, the suspension of liquidation proceedings is ended. If however, the application is granted, the suspension of liquidation proceedings endures until the business rescue proceedings end in terms of section 132(2).

Furthermore, in the case of *Van der Merwe and Others v Zonnekus Mansion (Pty) Ltd*, the court held that although the launching of business rescue proceedings had the effect of suspending liquidation proceedings, this did not mean that liquidators are deprived of their statutory powers but just that they are precluded from exercising them for the time being. In view of the abuse of process in that particular case, the court issued an order that the liquidation proceedings would not be suspending pending the finalization of any application to appeal the dismissal of the application to place the company in business rescue when there was already a liquidation application issued.

In the matter of *Jansen van Rensburg v Cardio-Fitness Properties*, the court found that despite the application for business rescue in terms of section 131, assets of the company in liquidation remain in the custody of the provisional liquidator until the business rescue practitioner or a final liquidator has been appointed. This was later confirmed by the SCA in *GCC Engineering (Pty) Ltd v Maroos and Others*.

Therefore the effect of such application would be to suspend the liquidation proceedings pending the adjudication of the business rescue application. The provisional liquidators will retain control of the assets of the company until the business rescue application is finalized and if successful the control of the company will be handed to the business rescue practitioner.]

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

Commented [M28]: 2 marks out of 2.

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)

[A general notarial bond does not confer either a security interest or title interest to its beneficiary. In order for the beneficiary (Crypto Bank) to be regarded as a secured creditor, it must take perfect its GNB and take possession of the assets registered under the general notarial bond. It can do so either with the consent of the business rescue practitioner or court order authorizing it to do so.

Accordingly, the Ms. Van Zyl would be able to sell the assets in question without the consent of Crypto Bank as the bond has not been perfected.]

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)

[In terms of the Act, business rescue practitioners are given extensive powers to manage the company's business and to monitor its assets with the aim to rescue the company. In return, the Act imposes a great deal of responsibility on them. The success of the business rescue proceedings depends to a large extent on the competency, skills and experience of the business rescue practitioner.

Klopper N.O and others v Ragavan and others, the court held that the business rescue practitioners, have a clear right to exercise the powers afforded to them in terms of the Act. The court further stated that the applicants are obliged to take whatever steps necessary to carry out their obligations and powers under the Act.

Sarah van Zyl can sell the assets in terms of section 134(1)(a). The requirements for such disposal would be that

- the assets must be sold in the ordinary course of the company's business;
- in a *bona fide* arms length transaction for value; or
- in a transaction contemplated within and undertaken as part of the implementation of a business rescue plan that has been approved in terms of section 152.

]

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)

[Section 134(3) protects the holder of security by requiring the practitioner to obtain express consent before disposing of the property which is subject to security.

Sarah van Zyl would therefore have to either in terms of section 134(3)(a) obtain the prior consent of Crypto Bank as the holders of security or in terms of 134(3)(b) promptly pay to Crypt Bank the full indebtedness secured by the material distribution agreement or provide security for the amount of those proceeds.

In *Louis Pasteur Holdings (Pty) Ltd v Absa Bank Limited*, the court held that periodic payments that would eventually discharge the indebtedness do not comply with the requirements of section 134(3). This case dealt with an application by a company in business rescue that it be allowed to use rental proceeds to fund the business rescue even though the rentals were ceded to Absa Bank. They argued that they would make periodic payments that would eventually settle Absa's claim.

Ms Sarah van Zyl therefore requires the consent of Crypto Bank or in the event that the proceeds of the PCF are sufficient to discharge the indebtedness, promptly pay the proceeds to Crypto Bank or provide security to the value of the proceeds.]

Question 9

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

Commented [M31]: 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.

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)

[Chapter 6 of the Act is designed to try and prevent job losses by affording some protection to employees during business rescue proceedings. Sections 136(1)(a) of the Act deals with the status of employees and their contracts of employment. It provides that during a company's business rescue proceedings, employees of the company who were under the employ of the company immediately before the beginning of those proceedings continue to be employed on the same terms as before the commencement of business rescue except where changes occur in the ordinary course of attrition or the employees and the company agree to different terms in accordance with the provisions of the labour laws.

In terms of section 136(1)(b), any retrenchment of employees as contemplated in a business rescue plan is subject to section 189 and 189A of the Labour Relations Act.

In the matter of *South African Airways SOC Ltd v National Union of Metalworkers obo members*, the court held that section 136(1)(b) of the Act requires that any retrenchments contemplated during business rescue proceedings need to be dealt with in the business rescue plan. This effectively means that a business rescue practitioner cannot commence section 189 process until such a time as a business rescue plan has been published.

There is no provision in Chapter 6 of the Act which empowers a practitioner to retrench employees in the absence of an adopted business rescue plan. A business rescue plan under the Companies Act is therefore a condition precedent to the commencement of the retrenchment process under the LRA.

The business rescue practitioner therefore did not follow the correct procedure as she finalized the section 189 process before a business rescue plan has been published]

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.

[Section 144 of the Act provides for the rights of employees during a company's business rescue.

These include the right for any employees who during the business rescue are represented by a registered trade union to exercise any rights set out in Chapter 6 of the Act collectively through a trade union and in accordance with the applicable labour laws or if not represented to exercise these rights directly or by proxy.

Employees of Khusela also have the right to have any remuneration, reimbursement or other money relating to employment which became due prior to business rescue to be recognized as preferred unsecured creditors.

Employees are also entitled to receive notices] regarding any decision, meeting or other relevant event, to participate in any court proceedings, form employees committee, be consulted by the practitioner during the development of the plan, be present and make submission at the meeting of the holders of voting interest, vote on a motion to approve the plan (to the extent that an employee is a creditor) and if the plan is rejected to propose alternative plan or make an offer to acquire interest of affected parties.

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 section 140(1)(a) and (b) of the Act, once a company is placed under business rescue, the appointed practitioner assumes full management control of the company in substitution of the board and pre-existing management and may then delegate any power or function to a director or pre-existing management.

In terms of section 137(2) of the Act, during a company's business rescue, each director of the company must continue to exercise the function of director subject to the authority of the business rescue practitioner. The board and executives of the company have a duty to continue to exercise management functions within the company in accordance with the instructions of the business rescue practitioner.

The CEO, CFO and board of Khusela are also required to provide information about the company's affairs as required by the practitioner.

Any action taken by the CEO, CFO and board without the approval of the practitioner, that action will be void unless it is approved by the practitioner. The board is expected to act in the best interest of the company]

Commented [M33]: 1 mark. 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.

Needed to state that the CEO and CFO were bound to cooperate with and act in accordance with the instructions of the BRP.

Question 12

Commented [M34]: 5 marks.

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

[Section 150(1) of the Act places an obligation on the practitioner to consult with creditors, other affected person and the management of the company before preparing a business rescue plan for consideration. Consultation with all affected persons prior to the development and publication of a business rescue plan is essential.

The Act does not define the word "consultation". The Oxford dictionary defines consultation as: the action or process of formally consulting or discussing.

In the case of *Hlumisa Investments Holding (RF Limited and Another) v Van der Merwe NO*, the court held that there is a clear distinction between "informing" and "consulting". With regard to consulting, the court agreed with the approach adopted in the case of *Scalabrini Center Cape Town v Minister of Home Affairs and Others* which stated that consultation entails a genuine invitation to give advice and a genuine receipt of that advice.

Consultation should not be treated mechanically or as a mere formality, in other words the engagement must happen before the decision maker has made up his mind and is not open to persuasion. The engagements must be one which enables consultation to occur in a substantive sense.

The Court in *Hlumisa* found that informing creditors and shareholders of what was happening via Stock Exchange New Service announcement did not amount to consultation and accordingly a meeting to vote on a plan was interdicted.]

Question 13

Commented [M35]: 2 marks.

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

[In terms of section 143, Ms Sarah van Zyl as the business rescue practitioner is entitled to charge the company for the remuneration and expenses incurred as per the tariffs set out in the Act.

Further remuneration can be proposed by the practitioner in terms of section 143(2) such as fees for attainment of any particular result.

The further remuneration must be approved by the holders of the majority voting interest and majority holders of the voting rights attached to any shares.]

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)

[Regulation 127(2) and 26(2) of the Act provides for a company score and the score range in order to determine if the company is small, medium or large. The score is calculated as follows:

- Number of employees (1 point per employee) = 2000 Points
- 1 Point for every R1m (or portion thereof) in third party liability;
- 1 Point for every R1m (or portion thereof) in turnover during the financial year;
- 1 Point for every individual who at the end of the financial year has an interests in the companies issued security.

If score is below 100 points, company is regarded as small, between 100 and 500 points is medium and above 500 is a large company.

Khusela has approximately 2000 employees at commencement of business rescue, on this score alone the company has 2000 which would classify it as a large company for purposes of the Act.

Question 15

The case study includes the following statements:

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

and

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

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

Commented [M36]: 2 marks. Needed to set out the tariff amount that Sarah would be able to charge.

Commented [M37]: 1 mark. Needed to state that Sarah only concluded that the company was capable of being rescued some time after the first meeting of creditors and as such was likely in breach of her obligations to inform creditors whether there was a reasonable prospect of rescuing the company. Needed to state that Sarah should have commenced an investigation immediately on being appointed to comply with the duty to inform creditors that the company was capable of being rescued.

[An applicant seeking an order to commence business rescue must nominate a business rescue practitioner for appointment in the application.

If the court subsequently makes an order placing the company in business rescue, the court must make a further order appointing as interim practitioner the person so nominated. This appointment will be subject to ratification by the majority of independent creditors at the first meeting of creditors held in terms of section 147 of the Act.

It is possible that the practitioner failed to convene the first creditors meeting within 10 business days after being appointed as contemplated in section 147 of the Act. This meeting should have been convened within 10 business days from date of appointment . At the meeting creditors should have been informed whether the practitioner believed there were reasonable prospects of rescuing the company. A notice of such meeting should have also been sent to all known creditors of the company.]

Question 16

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

[In terms of section 132(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 may allow he practitioner must:

- 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.
- The practitioner must furthermore deliver the report and each update in the prescribed manner to each affected person and to the court (if the proceedings are the subject of a court order) or the Commission in any other case.
- The report must be filed with a duly completed Form CoR 125.1 as per the Practice Note 3 published by the Commission.

The intention of the legislature in this instance was to insure that business rescue proceedings do not go on for an indefinite period of time, thus prejudicing the rights of affected persons.

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

Commented [M38]: 2 marks. Needed to mention section 150(5) - securing an extension of time to publish the BR plan.

Commented [M39]: 1 mark. 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 the Companies Act. Conclusion needs to be based on the fact that Mr Siwisa together with a related person (Mrs Phillips) is able to exercise a majority of voting rights.

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)

[Shareholders together with employees, trade unions and creditors, are regarded as affected persons in terms of section 128(1)(a) of the Act. As such, they are afforded certain rights such as to be notified of, participate in, and object to the proceedings.

It is possible for a shareholder to also be a creditor of the company in business rescue such as is the case with Mr Siwisa. As such, he is entitled to vote on the plan in both capacities.

A shareholder who is also a creditor such as Mr Siwisa in certain circumstances may be said not to be independent. Section 128(1)(g) of the Act defines an independent creditor as a person who

- Is a creditor of the company, including an employee of the company who is a creditor in terms of section 144(2) and;
- Is not related to the company, a director, or the practitioner.

It is important to note that in terms of section 128(2) of the Act, an employee of a company is not related to that company solely as a result of being a member of a trade union that holds securities of the company.

On the facts of this matter, it is clear that Mr. Siwisa is a creditor of the company, however, he is related to one of the directors of the company and accordingly cannot be regarded as an independent creditor for the purposes of these business rescue proceedings.]

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)

[Section 151(1) of the Act requires a meeting to be held in order for creditors and any other holders of voting interest to consider the business rescue plan and vote on whether to adopt or reject such plan. The appropriate notices in terms of section 151(2) must be sent to all affected persons within the prescribed minimum time of at least 5 days.

Section 152(1) of the Act requires that at this meeting called by the practitioner, the practitioner must introduce the plan, inform creditors whether he believes the company still enjoys a reasonable prospect of success and invite discussion on the plan.

Commented [M40]: 4 marks. Needed to set out the steps in terms of which Sarah could validly amend the BR plan.

If the above discussions do not result in any proposals to amend the plan, the practitioner should call a vote for preliminary approval of the plan. If any proposals are made to amend the plan, a practitioner is required to entertain and conduct a vote (simple majority) on any motions to amend the plan in any manner seconded by holders of voting interest or adjourn the meeting to revise the business rescue plan for further consideration at a later date.

It is clear from the above discussion that the legislature envisaged a consultative process regarding the adoption of a business rescue plan. It then follows that any amendments to a plan would require the same consultative process and Ms. Sarah Van Zyl cannot unilaterally amend the terms of the business rescue plan.

In *Booyesen v Jonkheer Boerewynmakery (Pty) Ltd*, the court dealt with the issue of amendments to a business rescue plan by a practitioner after such plan had been adopted. The court found that there is no room for a business rescue practitioner to reserve a right to unilaterally amend a business rescue plan and thereby circumvent procedures set out in the Act (and outlined above). The court held that a business rescue practitioner does not have the power to impose on creditors a plan which they had not voted on and discussed in the manner contemplated under section 152 of the Act.

Accordingly the unilateral amendments made by Sarah van Zyl are invalid and not binding on the creditors as she did not have the power to make such unilateral amendments.]

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)

[If I were in the shoes of Opera Sound Engineering, I would expect to see the following:

- The balance sheet for the ensuing three year period as required in terms of the Act;
- The income statement on a monthly basis for the first year and annualised thereafter; and
- Detailed cash flow statement for the three years with the first year monthly and annualised thereafter.

The financial projections will greatly assist in assessing the overall proposal and likely success of the business rescue plan.]

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 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.

Commented [M42]: 2 marks.

[Cash flow is important to the success of the business rescue and it demonstrates how the business rescue dividend/distribution will be paid, future lifeblood of the business and highlights any potential liquidity challenges in the forecast period

I would accordingly advise Sarah van Zyl to include the cash flow statements as they will assist creditors in making an informed decision.]

Question 21

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

[The first advantage to employees would be that in terms of section 136, their status of an employee at commencement is not negatively affected both from a contractual statutory perspective. In other words the contractual rights of an employee that exist at commencement date of business rescue proceedings remain enforceable by the employee against the company.

Secondly, employees claims are catered for in the Act from both a pre- and post-commencement of business rescue perspective with specific provisions being made for the ranking of such claims such as the preferent claim granted to employees by section 135.

Employees also have the right in terms of section 144 to participate in the business and to make submissions at meetings, voting on motions and propose the development of an alternative plan or present an offer to acquire interests of creditors.]

*** END OF ASSESSMENT ***

TOTAL MARKS: [100]

Commented [M43]: 2 marks out of 3.
Employees are protected by labour law in context of business rescue / the Labour Relations Act is applicable to any dismissals for operational requirements.